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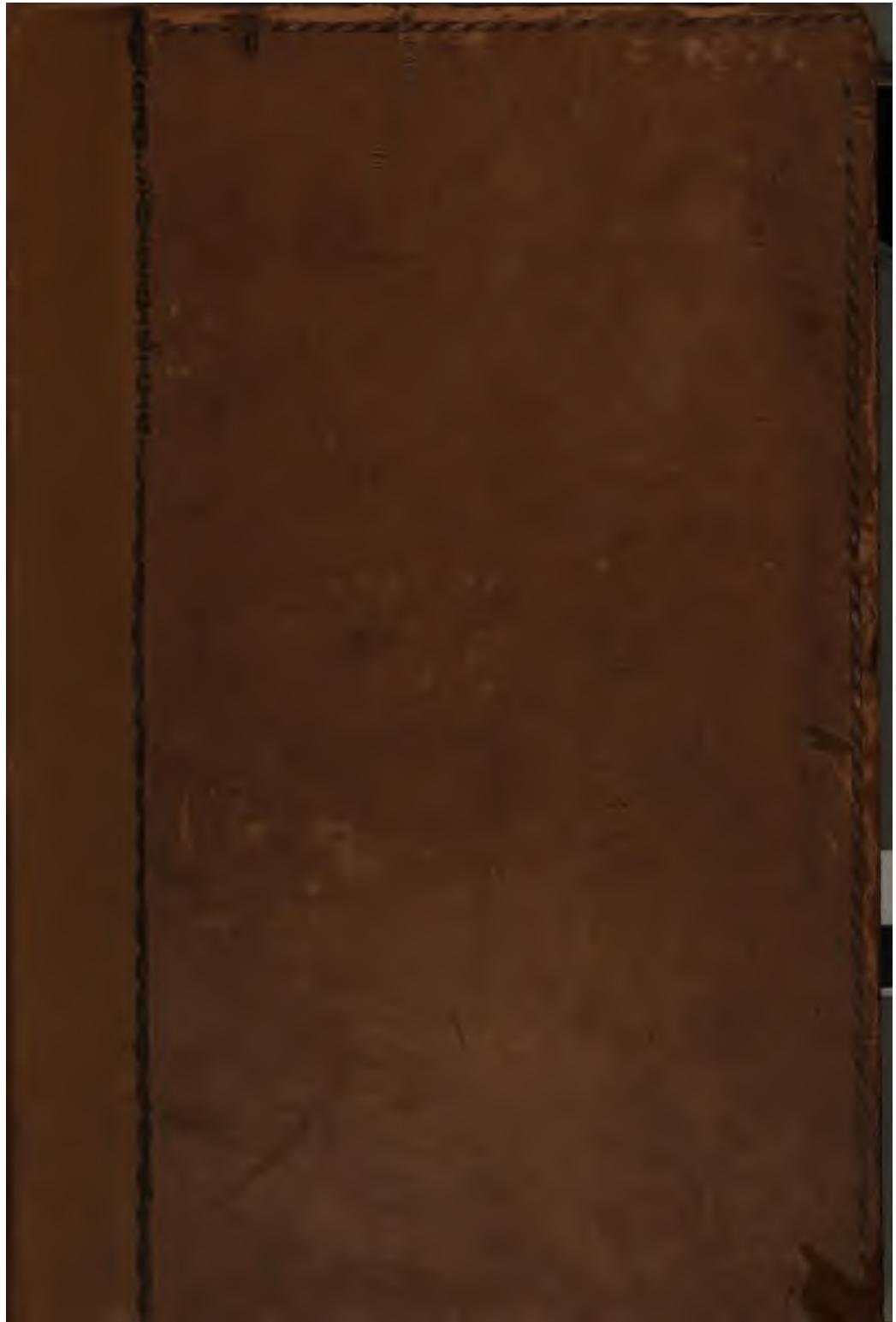
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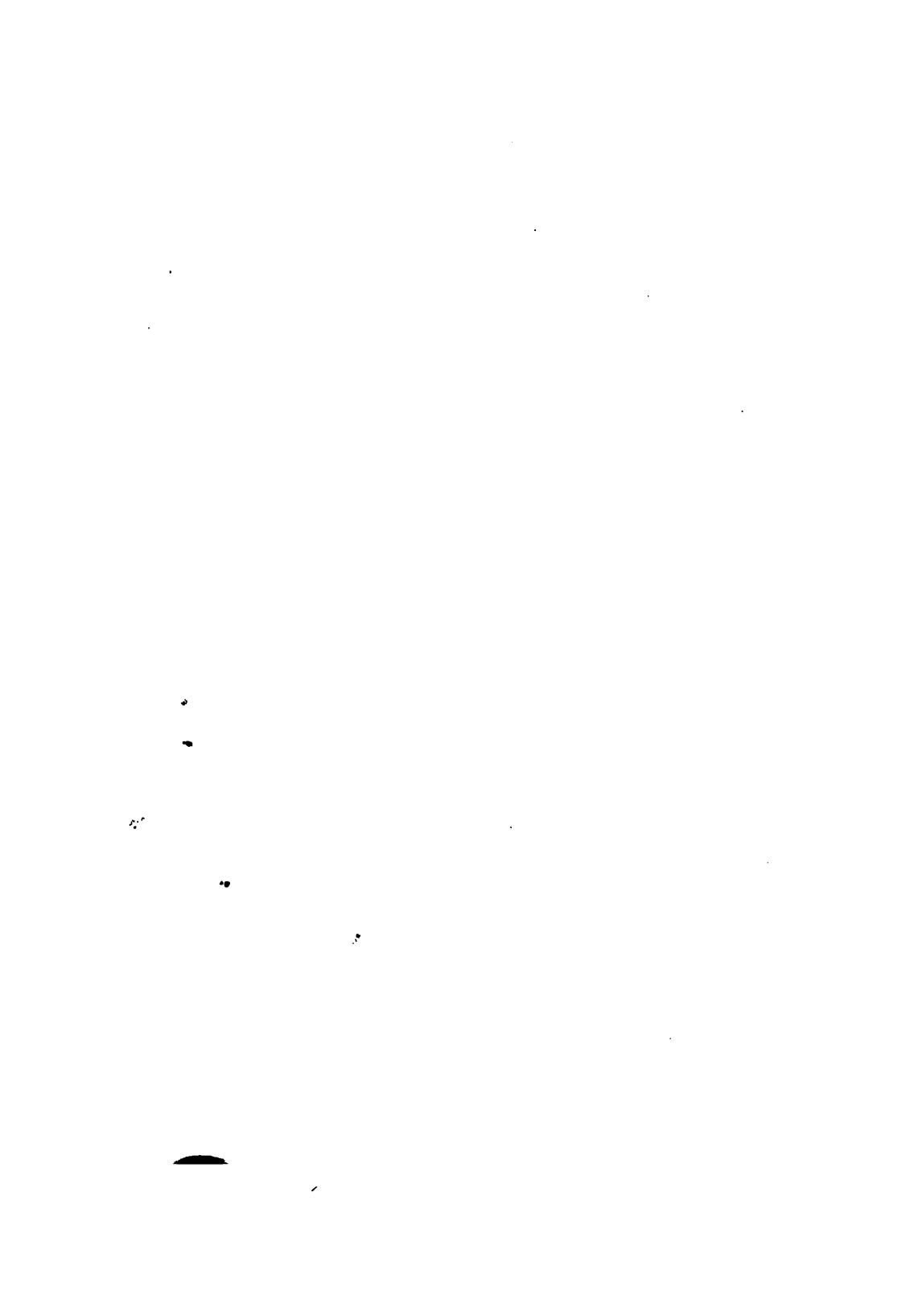
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Re Dabke No Bonds



R E P O R T S
OF
C A S E S
CONCERNING THE
R E V E N U E,
ARGUED AND DETERMINED
IN THE
COURT OF EXCHEQUER,
FROM EASTER TERM 1743, TO HILARY TERM 1767.
WITH AN
A P P E N D I X,
CONTAINING
CASES UPON THE SAME SUBJECT IN FORMER REIGNS.

BY SIR THOMAS PARKER,
LATE LORD CHIEF BARON OF THAT COURT.

WITH TWO TABLES;
THE ONE OF THE NAMES OF THE CASES, THE OTHER OF THE
PRINCIPAL MATTERS.

D U B L I N:

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M. DCC. XCI.

1791



THE
P R E F A C E.

AS there are but few legal decisions extant, which can be relied on as authentic, concerning the revenue, I thought that I could not employ some leisure time more properly, than in revising and preparing for the press a few cases upon that subject, in the determination whereof I had, myself, a principal share.

The additional cases were carefully transcribed from authentic manuscripts; and as the points therein decided are of some curiosity and importance, they are therefore thought well worth preserving for the benefit of the public.

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Easter



E A S T E R T E R M,

16 GEO. 2. 1743.

Attorney-General *against* Lancelot Allgood,
Esquire.

AN information of intrusion was exhibited in this court against the defendant, for intruding into a piece or parcel of pasture land, late parcel of the moor or common, called *Symondburn Common*, called by the name of *Hebill-Rigg*, lying on the north side of *Fenwick-Field* grounds, and laid to and held with *Fenwick-Field* farm, containing by estimation three acres, or thereabouts, and into several other lands; and also into all those collieries and coal mines, situate, lying and being within and under all those commons or moors, called *Wark-Fell* and *Symondburn-Fell* or *Common*, near *Coleburn*; all which said premisses are situate, lying and being in the parish of *Symondburn*, in the manor of *Wark*, and county of *Northumberland*.

A Defendant cannot plead several matters to an information of intrusion, by the Act 4 Ann. c. 16. for the Amendment of the Law.

Mr. *Fawkes*, on behalf of the defendant, moved for leave to plead three several matters: First, The general issue.—Secondly, That the B premisses

premises are part of the defendants Manor of *Symondburn*, and traverse that they are parcel of the Manor of *Wark* in the information.— Thirdly, the statute of limitations, before the King's title accrued to the manor of *Wark*.

An order being made to shew cause, the question was spoke to at large by Mr. *Fenwick*, Mr. *Wilbraham*, Mr. *Craister*, and Mr. *Bootle*, for the defendant, and by Mr. Attorney and Mr. Solicitor-General for his majesty ; and after time taken to consider of what had been insisted upon by the counsel on both sides, I delivered the opinion of the court.

The question is, whether several Matters can be pleaded to an information of intrusion.

But before I consider the statute for the amendment of the law, it may be proper to state what prerogative the crown had in informations of intrusion at common law, and how it was abridged by 21 *Jac. 1. c. 14.*

It appears by *Dyer*, 238. b. and 4 *Inst. 116.* that by the antient course of this court, if a defendant pleaded Not guilty to an information of intrusion, he should lose his possession.

The statute, 21 *Jac. 1. c. 14.* recites, That where the King, out of his prerogative, may enforce the subjects in informations of intrusion to plead title, the King, out of his gracious disposition, being willing, to remit a part of his antient and regal power.

It

It is enacted, That the defendant may plead the general issue, where the crown hath been out of possession twenty years before the information brought; and in such cases the defendant shall retain the possession until the title be found for the King.

The law standing thus, I now proceed to consider the clauses 4 Ann. c. 16. upon which the present application is founded.

By Sect. 4. It shall be lawful for any defendant or tenant, in any action or suit, or for any plaintiff in replevin in any court of record, with the leave of the same court, to plead as many several matters as he shall think necessary for his defence.

Sect. 5. Provided, that if any such matter shall be judged insufficient, costs shall be given at the discretion of the court; and if a verdict shall be found upon any issue in the cause for the plaintiff or defendant, costs shall be given in like manner, unless the judge who tried the issue shall certify, that the defendant or tenant, or plaintiff in replevin, had probable cause to plead such matter, which upon such issue shall be found against him.

It has been insisted for the King, that the King, not being expressly named, is not bound by this act.

2 Inst. 191. The crown is not bound where it would be ousted of a precedent prerogative without express words.

EASTER TERM, 16 Geo. 2. 1743.

Ascough's case in the court of Wards, Cro. Car. 525, 526. General words, where the King is not named, shall never bind or bar him.

And it has been said, That for that reason, according to the cases of *Audley* and *Halsey*, 1 *Jo. 202. Philips and Thompson*, 3 *I.ev. 69, 191. 2 Shower 481. Brassey and Dawson*, 28 of June 1734, *B. R.* that neither the Statutes *de Mercatoribus*, nor of the staple, nor of bankrupts, shall bind the crown.

The *King and Franklin, Hilary, 5 Geo. 2. B. R.* the statute 7 & 8 *W. 3. c. 32.* for a *venire de novo*, does not extend to the crown; and the reason given by Lord Chief Justice *Raymond* was, because it speaks of Plaintiffs and Defendants.

But though it is a general rule, that the King shall not be bound by statutes which do not name him, yet this rule has several exceptions, as is manifest from the cases cited by the defendant's counsel.

They are enumerated in the case of ecclesiastical persons, 5 *Rep. 14.* All acts to suppress wrong or fraud, or to prevent the Decay of religion, bind the King.

And therefore in that case of 5 *Rep. 14.* it was held, that leases made to the Queen by colleges or Deans and Chapters, were void, because they tended to the decay of religion. And so is *Magdalen College Case, 11 Rep. 70. a. and Hob. 157.*

So

So acts to suppress wrongs, as Lord Berkley's case, *Plowd.* 236, 237. That if a gift in tail be made to the King, he cannot alien to defraud him in reversion, or his issue, for he is bound by the statute of *Westminster 2. de Donis Conditionalibus.*

The statute of *Marlbridge*, of distresses, binds the King, 2 *Inst.* 142.

11 *Rep.* 72. b. 2 *Inst.* 359. The statute of *Westminster 2. c. 5.* *Quod quotiescumque aliquis jus non habens tempore hujusmodi custodiarum presentaverit*, held, that this act made to suppress wrong bound the crown.

2 *Inst.* 681. For the same reason, the statute of 32 *Hen.* 8. c. 28. Of discontinuances, binds the crown.

The case cited in the *bishop of London* and *the King*, *Show. Parl. Cases*, 179, 180, stands upon a different reason, as reported in that book. If two churches are united by act of parliament, and the first turn is given to the patron of the greater living, and the King is the patron of the lesser living, it was held by the civilians at *Doctors Commons*, before the Chancellor of *London*, and several assistant delegates, that the other patron should present to the first turn, because a new right of presentation is given, and must be taken as it is given.

These are all the cases which have been cited by the defendants council, except the case

case of *Bewdley*, which I shall state, and give a particular answer to by and by.

And these cases I am so far from disputing, that I admit them to be law; and my next inquiry shall be, whether they are applicable to the present question.

As to *Magdalen College* case, 11 Rep. 70. a. It will be proper to compare the words of the statute 13 Eliz. and the reasoning of the judges upon them, with the words of the fourth and fifth sections of the statute for the amendment of the law; and then see what the natural inference will be.

The words of the 13 Eliz. are to any person or persons, body politick or corporate; and the judges observe, that, without question, the Queen is a person, *Rex est persona mixta*, and a body politick; then, if the act be general, and the Queen be clearly included in the words, and if exempted out of the act, it must be by construction, the law will not make such construction to the prejudice of religion.

So that the Queen was within the express letter of the 13 Eliz. but in the present case, the act speaks of defendants and tenants, plaintiffs and demandants, and plaintiffs in replevin; and the King is not expressly included; and if we were to include him, it must be by construction, which would overturn many authorities already cited, and some others which I shall have occasion to mention.

But it is further observable, that two of the reasons upon which the cases cited by the defendant's

dant's counsel are founded (*viz.*) the advancement of religion and the suppression of fraud totally fail in the present case ; and the remaining consideration is, whether the restraining of a defendant from pleading several matters in his defence was a wrong of such a nature as these cases allude to. And it seems to me pretty extraordinary to charge a rule of the common law, (which prevailed for centuries, as appears by *Co. lit.* 303. *a.*) with such an imputation ; and it will afford no argument that this was a wrong within the meaning of these cases, to say, that the publick wisdom of the nation has made an alteration, and allowed of pleading several matters, because that argument would equally have held to have amended or cured slips and defects in pleading in the case of the crown ; and yet neither the statutes of amendments, nor of jeofails, extended to the case of the crown, because they spoke of challenge of the party, or between party and party ; and so it was held as to the statutes of amendments, in the *Queen and Tutchen*, 1 *Salk.* 51. and 6 *Mod.* 284. .

Then, as to the statute of jeofails, 21 *Jac.* 1. c. 13. in the case of the *King and Sherrington Talbot*, *Cro. Car.* 311, 312, it was held, that that Statute does not extend to a *Quo Warranto*, nor to informations of intrusion, for the King is not bound unless he be named ; but Mr. attorney general *Noy* said, per-adventure it would be otherwise in the case of a *quare impedit*, where the suit is between the party and the king.

Mr. *Noy* was a very learned man, and supposing him right in what he said, it will not govern

govern the present case, because there is a difference between a *quare impedit*, where the king sues in that name by original writ, and where he sues in the name of his attorney general by information.

As to the case cited out of *Shower's parliament cases*, though the only reason given in the book was, that it was a mere right of presentation, and must be taken as the act gave it; yet it seems to me, that that case stands upon the same principle of reason as the other cases (*viz.*) that the act would have done a wrong, if the course of presentation had been inverted, and the crown had been preferred in the presentation, 5 Co. 55. b. But besides, let us consider what was the determination of the principal case of the *bishop of London* and the *King*, both by the court of King's Bench and the House of Lords, that though by the act the right of presentation was vested in the *bishop of London* and the *Lord Jermyn* alternately, yet that the King, by promoting the incumbent to a bishoprick, had a right to supply that turn by his prerogative, and that that right was not affected by the act.

But it has been insisted by the defendant's counsel, that this matter has been in effect determined in the case of the *Queen* and the *bailliffs and burgesses of Bewdly*, 1 Williams, 214.

That was a *scire facias* out of the petty bag to repeal a charter granted to the borough, 7 Ann. the *venire* was awarded *de vicineto*, and the question was, whether it was well awarded,
or

or should not have been *de corpore comitatus*, which depended on the fifth section of the act for the amendment of the law : The words are these,

And whereas delays do frequently happen in trials, by reason of challenges to the arrays of pannels of jurors, and to the polls for default of Hundredors ; Be it enacted, that every *venire facias* for the trial of any issue, in any action or suit, in any of her majesty's courts of record at *Westminster*, shall be awarded of the body of the proper county where such issue is triable.

Lord Chief Justice *Parker* delivered the opinion of all the judges, that though this clause might have extended to the causes of the crown, if the objection had been recently made, yet the practice of the crown office and this court having been from the making of the act to award *venire's de vicineto*, it would be, in some measure, to overturn the justice of the nation, if the practice should be disallowed, and therefore they held the *venire* well awarded *de vicineto*.

But the counsel for the defendant in that case, who contended that the *venire* was misawarded *de vicineto*, and that it ought to have been *de corpore comitatus*, distinguished that clause from the clauses now under consideration, and took notice that the act consisted of distinct branches; which were as several laws, some of them being jeofails, and others alternative of the common law, and that the words of them did not extend to the crown, and particularly

cularly these clauses which speak of defendant or tenant, plaintiff or demandant, or plaintiff in replevin. *1 Williams 218.*

That case furnishes me with a further instance to shew, that an act which does not name the crown does not extend to it.

And that is upon the statute of frauds and perjuries, 29 Car. 2. c. 3. s. 16. whereby executions are made to bind only from the time of the delivery of the writ to the sheriff, which act has general words, every writ of execution, and yet the crown is held not to be bound by it: *The King and Mann, 2 Strange, 749.*

And with the case of the *Queen and Foley*, motion to plead double to an information in the nature of a *quo warranto* was denied, because it was not within the clause. And the constant practice of the court of King's Bench is agreeable to this, as I have been informed upon this occasion by Mr. *Masterman*, a very knowing and experienced officer.

But it has been objected, that an information of intrusion is a civil suit, and an information in the nature of a *quo warranto* a criminal one: And I do incline to think this to be a civil suit; but whether an information in the nature of a *quo warranto* be a criminal or a civil suit, we do not take upon us (because it is not necessary to be done) to determine. In the case of the *King and Bennet*, Mayor of *Shaftsbury, Trinity, 4 Geo. 1.* the twelve judges were equally divided upon that question; and what is very remarkable, two upon each bench

bench were of different opinions—*Parker, Bury, Powys, Blencowe, Dormer and Fortescue*, that it was criminal—*King, Tracy, Price, Eyre, Pratt and Mountague*, that it was not; and the question has received no judicial determination since that ever I heard of.

But yet there seems to be a good deal of analogy between informations of intrusion and informations in the nature of a *quo warranto*.

An information of intrusion is for intruding upon the possessions of the crown.

And the judgment in the case of *Alton Wood's*, 1 Rep. 40. a. is, that the defendant *de intratione, intrusione, transgressione, et contemptu praedictis convincatur, ac quod Def. amoveatur a possessione praemissorum ac attachetur per corpus suum ubicunque, &c. ad faciend. finem cum Domina Regina pro praedictis transgressione et contemptu, unde in forma supradicta convictus est.*

An information in the nature of a *quo warranto* is for usurping a publick office.

The judgment, according to the printed case of the *King and Pender*, which was heard in the House of Lords, March 18, 1725, is,

That the defendant *de et in officio libertate privilegio et Franchesia praedictis nullo modo se intromittat, sed ab eisdem et eorum quolibet penitus abjudicetur et excludatur, et quod praedictus Def. ad satisfaciend. Domino Regi de usurpatione praedicta*

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dicta capiatur, with an addition of costs, by 9
Anne c. 20. s. 5.

And these two sorts of information are considered as similar, in *Cro. Car. 311, 312.*

An objection arose from the seventh section of the act, that according to the rule of *exceptio probat regulam in non exceptis*, the defendant ought to be at liberty to plead these pleas, because appeals of felony or murder, and indictments or presentments of treason, felony or murder, and actions or informations upon penal statutes, are only excepted.

There is the same clause in 21 *Jac. 1. c. 13.* and I believe this was transcribed from it, and the same argument made use of in *Cro. Car. 311, 312*, but it was disallowed.

The defendant's counsel had also recourse to the 24th section, that this act, and all the statutes of jeofails, shall extend to all suits in any of her majesty's courts of record at *Westminster*, for the recovery of any debt immediately owing, or any revenue belonging to her majesty, her heirs or successors.

And it was insisted, that this was an information for the crown revenue; but this clause principally respects informations for duties, extents, writs of *Diem clausit extremum* and *scire facias*, for the recovery of the revenue; and this information is for the recovery of the land itself; and though in a large sense of the word revenue, this may be considered as a revenue cause,

cause, as the land is nothing but the rents and profits it produces, and the rents and profits of the crown estate are properly the land revenue of the crown.

The meaning of the words, that this act and all the statutes of Jeofails shall extend to the cases there mentioned cannot be, that all the clauses of the act shall extend to them, because many of them have not the least relation to the proceedings of the crown in courts of justice; if not all, then the question will be, what clauses? I answer, such clauses as are of the same nature and Tendency as the 24th section itself, and that is, to aid and assist the proceedings of the crown; and consequently the first clause relating to demurrers, to aid defects not specially assigned for cause of demurrer; and the second and third clauses relating to jeofails for the same reason: It may be then asked, Why not the fourth and fifth clauses for aiding several matters? The reason is, because such a construction, instead of making the 24th clause an aiding clause, would bring new difficulties upon and be to the disadvantage of the crown, both in respect of pleading and proof, which would be contrary to the whole tenor and spirit of the clause.

As Lord Chief Justice *Hobart*, in *Needler* and *The Bishop of Winchester* 226, takes it for granted, that one chapter of an act of parliament may be both general and particular, because one chapter may contain diverse acts and laws, which may be as several in their natures as if they were in several chapters: I apprehend, by parity of reason, that where there

are

are different provisions for different purposes, and penned in different words in the same chapter, they ought to be so construed, to avoid inconsistency, as if they had been in different chapters; and it seems to me to be plain, that if the 24th section had been in a different chapter, it could not have influenced the construction of the fourth and fifth sections of the act.

This act has been in force above thirty-seven years, and no case produced where a defendant has been allowed to plead several matters against the crown.

As to the argument drawn by Mr. Attorney and Solicitor General, from the 9th of Queen Anne, c. 20. that it was understood that the act 4th *Anne* did not extend to the crown, because the statute 9th of *Anne* extended it and the statutes of jeofails to mandamus's and informations in nature of a *quo warranto*: It was fully answered by the 24th section of the 4th of *Anne*, that that statute only extended to suits for debts due immediately, or revenue belonging to the crown, and so it was necessary to extend it by the 9th of *Anne* to mandamus's and informations in the nature of a *quo warranto*, and therefore I lay no stress upon that argument.

So as to the argument from the words action or suit, it has been held, that action will not include an information; the *King and Buckley, Hilary, 11 W. 3. 1698, in Scaccario*; but suit undoubtedly will, and therefore this must likewise be laid out of the case.

The

The only remaining case is *Hardr.* 189. where the pleading of double matter was allowed by the Attorney General's consent ; but Mr. Attorney, in the present case, has sufficiently shewn his dissent ; and for these reasons we are all of us of opinion, that the defendant ought not to be allowed to plead these several matters to this information of intrusion, within the intent of the statute for the amendment of the law, and the rule to shew cause was discharged, *per totam curiam*, on the 3d of May, in *Easter Term*, 16 Geo. 2. 1743.

Since the delivery of this opinion, the case of the King and *Huggins* has been printed in *Comyns's Reports* 422. that the defendant, in an action for an escape, was allowed to plead double *non debet et recentier infecutus est*; the answer is, that the case is misreported; for though on the 26th of April, 1729, there was a rule to shew cause why these pleas should not be pleaded, yet that rule was discharged on the 10th of May following; and it appears by the record, that the defendant did not plead *non debet*, but only a recaption by fresh pursuit.

The case of the *Attorney General* and *Snow* has also been since printed in *Bunbury*, 96, where the defendant had leave to plead double to an information of debt, *non est factum*, and conditions performed, but the reporter makes a quære, whether the act of the 4th of *Anne*, for the amendment of the law, extends to the case of the crown ?

I, not-

I, notwithstanding this case, see no reason to depart from the opinion of the court, in the *King and Allgood*, especially as it was confirmed in the case of the *King and Sir Clifford William Philips*, in *Hilary*, 20 Geo. 2. and the practice has been accordingly ever since.

**The King against The Estate of Henry Boon,
deceased.**

No Diem
clausit ex-
tremum
can issue re-
gularly
against the
estate of a
person, who
was not
debtor to
the King,
or found in
his life-
time to be
debtor to
the King's
debtor.

MR. Starkie and Mr. Wilbraham moved to supersede a *Diem clausit extremum* against the estate and effects of *Boon*, and that four hundred pounds, being the value of the goods seized, (which had been brought into court by his administratrix) might be restored to her.

The case was this :

January 1, 1738, Richard Wollafton, as receiver of the land tax for the county of *Salop*, entered into a bond to his majesty, conditioned to account for and pay what he should receive to his majesty's use.

October 28, 1740, an extent issued on this bond against *Wollafton*, whereupon an inquisition was taken, and *Edward Lewis* was found indebted to *Wollafton* in 770*l.* received by *Lewis*, to pay into the exchequer, on *Wollafton's* account, as receiver.

On

On this extent and inquisition a *scire facias* issued against *Lewis*, on which judgment was entered by *nil dicit*.

November 8, 1740, An extent issued against *Lewis*, reciting the extent against *Wollafton*, the inquisition thereon, and the judgment against *Lewis*.

November 10, 1740, An inquisition was taken thereon, whereby it was found, that *Boon* died the 20th of *September* last, and that he was indebted to *Lewis* in the several sums in the inquisition mentioned.

November 26, 1740, A *diem clausit extremum* issued against the estate and effects of *Boon*, reciting the first extent against *Wollafton*, and the inquisition thereon, and the judgment against *Lewis*, and the extent and inquisition against him.

December 10, 1740, An inquisition was taken thereon, and it was found that *Boon* died the 20th of *September* last, possessed of the several goods therein mentioned.

The goods have been, by order of court, restored to the administratrix of *Boon*, on her bringing into court 400*l.*

And two objections were made to the *diem clausit extremum*, by the counsel for the administratrix.

First, That *Boon* was not a debtor within the degrees allowed for proceedings in aid by the ancient practice of the court, and the rules made *Hilary, 15 Car. 1.*

Secondly, That *Boon* not being an immediate debtor to the King, or found in his life-time to be debtor to the King's debtor, no *diem clausit extremum* could regularly issue against his estate, but that a *scire facias* is the proper remedy in this case.

In support of the first objection, they cited, as to the ancient practice of the court, auditor *Povey's case, 4 Inst. 115.*

And the rules, *Hilary, 15 Car. 1.* which direct the form of the oath, and that no further inquisition shall be taken for debts in aid, than to inquire and seize the lands, debts, and personal estate of him that is debtor to the King's debtor or accountant, unless it be by special order made in open court.

In support of the second objection, they insisted, that though the common law gave the King preference in the payment of his debts, yet that the ancient legal writ of *diem clausit extremum* is founded on *Magna charta, c. 18.*

It is plain from the words of the statute in *2 Inst. 32.* that where a man died indebted to the King, his goods, which he had at his death, were bound to the King's debt, and his officer might seize them; but where he owed nothing to the King at his death, the goods . were

were to go to his executor or administrator, to be administered by him, and the King's officer could not meddle with them.

And they cited the case of *the King, in aid of Renew, and Lewin against John Cross, executor of Edward Taylor, November 23, 2 Ja. 2.* where the reason given in the order for letting aside the *diem clausit extremum* is, because *Taylor was dead before he was found indebted to the King, or to the King's debtor.*

And the case of *the King, in aid of Fire-brass, and others against Mary Porter, widow of William Porter*, where the *diem clausit extremum* was set aside the same day for the same irregularity.

Mr. Attorney General and others for the crown, in answer to the first objection, cited *Lane 112, 113.* which, as to the ancient practice of the court, is contrary to auditor *Povey's* case, in *4 Inst.* and the case of *the Attorney General and Poultney, Hardr. 403, 404.* that the third debtor is within the rules *15 Car. 1.* but no debtor in a more remote degree, and some precedents of the like writs of *diem clausit extremum.*

This case was adjourned for a few days, and on the 13th of *May*, in this term, I shortly delivered the opinion of the court upon the first objection, that in confirmation of *the Attorney General and Poultney in Hardress*, it was held in *Ewin's* case, *October 29, 1678,* that debts on simple contract, as well as on specialty, may be found to the third degree,

EASTER TERM, 16 Geo. 2. 1743.

within the rules, 15 Car. 1. upon oath and motion, but not beyond, and so again (among other points) in *Chambers* and *Briggs*, *et è contra*, in *Easter* term, 1696, though not finally decreed till *Trinity* following; and the practice has been the same where a *diem clausit extremum* has issued upon *affidavit* and a baron's *fiat* in the vacation; so this objection was over-ruled.

But the second objection was held to be fatal; and I relied on the words of *Magna Charta*, and the cases cited for *Boon's* administratrix, and thought that the precedents produced for the crown passing *sub silentio* ought to have but little weight against a plain law, and the cases determined by the court.

And the *diem clausit extremum* was suspended; and the four hundred pounds, which the administratrix had brought into court, were ordered to be restored to her by the whole court.

Trinity

TRINITY TERM,

16 & 17 Geo. 2. 1743.

William Scott (who prosecutes for his majesty and himself) plaintiff *against* David A'Chez Defendant.

THIS cause was intended for a second argument, but the defendant's Solicitor informed me, that his client declined it, and would rest his cause upon the first argument; and therefore I delivered the resolution of the court in the following manner, on the 14th of June, in this term.

It is an information grounded upon the statute of 12 Car. 2. c. 18. commonly called *the navigation act*; and sets forth, that the plaintiff seized the ship called the *Sea Horse*, with her tackle, apparel and furniture, and a parcel of wine and vinegar; for that the said goods were brought and imported in the said ship from parts beyond the seas into *Great Britain*, the said ship, at the time of the importation of the said goods, not being a ship which truly and without fraud belonged or appertained to the people of *England*, as the true owners or proprietors

An English
built ship,
importing
French
wines and
vinegar
France is
furnished by
the naviga-
tion act,
though such
ship be-
came
French
property
before the
importa-
tion, and
the master
and three-
fourths of
the mari-
ners were
French-
men.

proprietors thereof, and whose master, and three-fourth parts of the mariners, at least, were *English*; nor being a ship of the built or fabrick of that country or place of which the said goods were the growth, product or manufacture, or of that port where the said goods only can or are most usually first shipped for transportation, and whose master, and three-fourth parts of the mariners, at least, were of that country or place, contrary to the statute.

And the prayer of the information is, that the ship and goods may remain forfeited.

Upon which a writ of appraisement went out, and on the 30th of April 1742. was returned.

On this seizure, *David A'Chez*, merchant, entered his claim; and after *Oyer* of the information pleaded, that the goods mentioned in the information, or any part of them, were not imported from parts beyond the seas into *Great Britain* in the said ship contrary to the statute; upon which Mr. Attorney General joined issue.

This issue came on to be tried on *Thursday* the 8th of *July* last, before my brother *Carter*, and the jury found a special verdict.

That the ship mentioned in the information was *English* built, and not of the built of *France*.

That the ship, during the present war with *Spain*, and before the importation in question, was

was taken by a *Spanish privateer*, and condemned as prize, and regularly sold to a subject of the *French King*, residing in *France*, and became *French property*.

The jury further find, that the wines and vinegar seized were of the growth, production and manufacture of *France*, and after the said sale were imported from *Bourdeaux*, in *France*, into *Great Britain*, the said ship so continuing *French property*, and at the time of the importation not belonging to any of the people of *England*, as the true owner or owners thereof.

That the master of the ship, and three-fourths of mariners on board, at the time the wines and vinegar were imported in her, were *Frenchmen*.

The seizure by the plaintiff *Scott* is found as laid in the information.

But whether, upon the whole matter, the importation of the goods in the said ship is lawful or not, the jury doubt, and submit to the court.

Before the making of this law, the *Dutch*, though they had but little merchandize of the growth of their own country, had used to bring in their ships the growth and manufactures of all other kingdoms in the world, wine from *France* and *Spain*, spices from the *Indies*, and all commodities from other countries ; and their navigation was not only a nursery for seamen, but brought in a great flow of wealth upon them.

This

This being observed by the *English*, gave rise to the *navigation act*. which was first enacted in the time of the usurpation in 1651, as appears by *Scobell's collections*, and re-enacted in the 12th of King *Charles* the second, with some few variations.

Though this act concerned all other countries, yet it principally affected the *Dutch*, who (as appears by Lord *Clarendon's history*, and *Thurloe's state papers*) were greatly alarmed, and made their remonstrances by their ambassadors for the repeal of it ; but the *English* government then, and ever since, found it so beneficial, that they resolved to maintain it, and, I hope, ever will maintain it. *Clarendon's history*, vol. 3. part 2. pa. 458. *Thurloe's state papers*, 2 vol. pa. 374.

Upon this occasion it may be proper to consider the drift and design of the act of navigation, which is expressly mentioned to be for the increase of shipping, and encouragement of the navigation of the *English* nation.

The means proposed as most effectual for attaining this end were,

By section 1. That the importation of all goods from any of his majesty's dominions in *Asia*, *Africa*, or *America*, into *England*, *Ireland*, *Wales*, or *Berwick upon Tweed*, and the exportation from any of those places into any of his dominions in *Asia*, *Africa*, or *America*, should be in ships or vessels truly and without fraud belonging only to the people of *England* or

or *Ireland*, dominion of *Wales*, or town of *Berwick upon Tweed*, or were of the built of and belonging to any the said lands, islands, plantations, or territories, as the proprietors or right owners thereof, and whereof the master and three-fourths of the mariners at least were *English*, under the penalty of the forfeiture of the ship and cargo.

Section 3. Prohibits the importation of Goods from *Africa*, *Asia*, and *America*, generally, without confining the prohibition to the King's dominions, but in such ships as belong to the people of *England*, &c. or of the plantations, and whereof the master and three-fourths of the mariners are *English*, under the same penalty.

Section 4. That no foreign goods shall be imported into *England*, &c. but in *English* built shipping, or other shipping belonging to the aforesaid places, and navigated by *English* mariners as aforesaid, unless shipped from the place of which the goods were the growth, production, or manufacture, or in the port where they only can be, or most usually are, shipped for transportation.

Section 6. No goods to be loaded or carried from one port of *England* to another, in any vessel belonging to a foreigner not made a denizen, or naturalized, and if in the vessel of a subject of *England*, it must be manned as aforesaid.

By these methods all foreigners were excluded not only from the importation and exportation

tion of any goods of the growth or manufacture of *Asia, Africa, or America*, into or out of *England, Ireland, Wales, or Berwick*, and from carrying them from one port to another, but were likewise restrained from bringing them into any *European country* for the use of the *English*, since the *English* could not import them from thence, which must contribute greatly to the increase of the *English* shipping and seamen, and the encouragement of their navigation.

But though it was the policy of the legislature to prohibit the importation of all goods from *Asia, Africa, or America*, unless brought in vessels of the King's dominions, whereof the master and three-fourths of the mariners were *English*, yet it was wisely foreseen, that if we restrained the importation or exportation of *European* goods, unless in our own ships, and manned in the manner directed by the act, other kingdoms and states would do the like, and that, in its consequence, would amount to a prohibition of all such goods, which would be extremely detrimental to trade, and defeat the very design of the act.

To avoid this inconvenience, it is provided by the 8th section, (upon which and the 11th section this cause principally turns) that no goods of the growth or manufacture of *Muscovy*, or any of the countries thereto belonging; no sort of masts, timber or boards, no foreign salt, pitch, tar, rosin, hemp or flax, raisins, figs, prunes, olive-oils; no sort of corn or grain, sugar, pot-ashes, wines, vinegar, or spirits called *aquaviteæ*, or brandy wine, should be imported into *England, Wales, or*

or town of *Berwick upon Tweed*, in any ship or vessel whatsoever, but such as truly and without fraud did belong to the people thereof, and whereof the master and three-fourths of the mariners, at least, are *English*; and that no currants, or other commodities, of the growth or product of the dominions or territories of the *Ottoman* or *Turkish* empire, should be imported into any of the said places in any ship or vessel but which is *English* built, and navigated as aforesaid, and in no other, except only such foreign ships and vessels as are of the built of that country or place of which the said goods are the growth, production or manufacture respectively; or of such port where the said goods can only be, or most usually are, first shipped for transportation, and whereof the master and three-fourths of the mariners, at least, are of the said country or place, under the same penalty and forfeiture of ship and goods.

Now to apply this clause to the present case.

The clause (as was observed by Mr. Solicitor General) consists of a prohibition and an exception; wines and vinegars (which are the cargo of this ship) are among other goods prohibited to be imported in any ship or vessel but such as truly and without fraud belonged to the people of *England*, and whereof the master and three-fourths of the mariners were *English*.

But this ship is found to be *French* property, and to be navigated by a *French* master and mariners, and therefore is plainly within the prohibition in this clause.

Let

Let us next see whether it is within the exception.

Except only such foreign ships and vessels as are of the built of that country or place of which the said goods are the growth, production or manufacture respectively, or of such port where the said goods can only be, or most usually are, first shipped for transportation, and whereof the master and three-fourths of the mariners, at least, are of the said country or place.

This ship is found to be *English* built, and not of the built of *France*, and so wants one of the requisites to bring it within the exception.

And the words, ship or vessel of the built of the country or place, were not inserted by any accidental mistake, but intended by the legislature ; for the same expression occurs in section 11, where forfeiture of office is imposed upon any officer of the customs who shall allow to any foreign built ship, bringing in the commodities of the growth of the country where it was built, the privilege by this act given to such ship, until examination and proof whether it be a ship of the built of that country, and that the master and three-fourths of the mariners are of that country.

But it was objected, that the main design of the act was, that the *English* should be carriers, and not foreign nations, and therefore that they may carry as well in foreign built ships,

ships, being their property, as in ships of the built of their own country.

By the clauses Mr. *Bootle* mentioned, *Englishmen* being the owners of foreign built ships, and qualifying them according to the 10th section, and manning them with a master and three-fourths of *English* mariners, may undoubtedly navigate them as *English* ships: And it is enforced by the 11th section, which distinguishes between *English* and foreign property: And with respect to *English* property, the direction is, that if any officer of the customs shall allow the privilege of an *English* built ship, or other ship to any the aforesaid places belonging, (that is *England*, &c.) to any *English* or foreign built ship, coming into any port, and making entry of any goods, until examination whether the master and three-fourths of the mariners are *English*, he shall forfeit his office; but in the case of foreign property, the enquiry is, (as I observed before) whether the ship is of the built of the country of which the goods are the growth, and navigated by a master and three-fourths of the mariners of that country? and this privilege is confined to ships being *English* property, and manned with *English* mariners, and cannot be extended to the present case of foreign property, without rejecting the word (*Built*), which is mentioned in the 8th, and repeated four or five times in the 11th section.

But it was then insisted for the defendant, that if a foreign ship, purchased by an *Englishman*, may have the privilege of an *English* ship, *pari ratione*, or rather *à fortiori*, an *English* ship,

TRINITY TERM, 16 & 17 Geo 2. 1743.

ship, being foreign property, should be intitled to the like privilege, taking it (according to Mr. Solicitor's reasoning) that the encouragement of building ships is the seconday confide-
ration of the act.

Because if *English* built (which is the case of the ship now in question) the increase of shipping would have been answered to the kingdom, our own timber would have been used, our workmen employed, and we should have had the benefit of the rigging and furniture ; whereas, if she had been *French* built, she would have been duly qualified to have imported those goods, and we should have lost the benefit of the timber, labour, and equip-
ping her with rigging and furniture.

This seems to be very specious and plausible at first appearance, but is founded upon a supposition, that we could have prohibited the importation of *European* goods in foreign bot-
toms ; but as that could not be done with security to our trade, for the reasons I have mentioned, the force of this argument will soon vanish ; the parliament therefore planned the act upon the considerations mentioned by Mr. Solicitor.

Several countries, as *France*, *Spain*, and *Italy*, can more easily buy ships than they can build them.

Other countries, as *Russia*, &c. had timber and materials enough for building ships, but wanted sailors.

Therefore

Therefore the parliament prohibited the importation of goods of the growth of any *European* country, unless in ships owned and navigated by the *English*, or in ships of the built of, and manned by sailors of that country, of which the goods were the growth.

The consequence was, that foreigners could not make use of the ships they bought, though the *English* might, which must frequently force them to have recourse to our shipping, and so the general intent of the act, to secure the carriage to the *English*, was answered as far as it possibly could be ; whereas, if foreign property had been sufficient to qualify ships, foreigners might have bought ships where they pleased, and manned them with their own sailors, and then not only the freight, but the employment of our sailors, would have been lost to *England* ; and this will greatly overbalance any advantage that could accrue to *England* from the building and equipping ships for foreign use.

But, besides, a statute ought never to be so expounded, as to have the secondary intent defeat the primary intent of it.

Mr. *Bootle*, to shew that the word *built* ought to be rejected, laid down several rules for the construction of statutes, from 1 *Infl.* 381. 1 *Bulstr.* 206. *Hob.* 299. *Plowd.* 154, 465. Lord *Mountjoy's* case, 5 *Rep.* That one part of a statute must help to expound another ; that the mischief, the main intent, and the scope

scope and end of a statute, are to be considered ; that statutes are to be expounded according to the rule of reason and justice that the words bear ; and that there is an equity to be used in the exposition of statutes, to extend the sense beyond the words, or to abridge and narrow the sense, according to the general intent of the act.

And to these rules I agree, and think that the construction which we put on this act does not contravene, but falls in with them.

It was then insisted, that, by 13 & 14 Cha. 2. c. 11. s. 29. though the power of issuing commissions for the examination of witnesses upon seizures is confined to the court of chancery, yet this court issues such commissions, and it is very certain that, in fact, this court issues such commissions.

The power of this court to issue such commissions came under the consideration of the court, in the case of *Jenkins qui tam* against *Larwood*, the 3rd of May, 1717. *Bunbury* 13. when it was insisted by Sir *Robert Raymond*, that it was a remedial law, and therefore by construction was to be extended to this court.

Lord Chief Baron Bury, and *Baron Price*, held, that such a commission should go, not by virtue of the act, but of their original jurisdiction.

Baron Montague, that it ought not to go either by the act, or their original jurisdiction.

Brother

Brother *Fortescue Aland*, then a baron, that a commission was warranted by the act.

So here are three Judges opinions against one, as to the point endeavoured to be proved from the construction of this clause.

As to the case of *Stephen Scott qui tam* against *Peter Joille*, relating to the ship *St. Claude*, cited by Mr. Solicitor, I have not only seen the custom-house report, but Sir *Edward Northey's* original opinion upon the case, which is stated thus.

The ship *St. Claude* was an *English* built ship, and during the war with *France* was taken by the *French*, and condemned as Prize, and, being *French* property, imported wines into the port of *London*, navigated with a *French* master and mariners ; and he thought her forfeited by the 8th section of the navigation act.

I have also perused the record of that case, which is entered *Easter 1 Geo. 1 Roll. 6.* and the cause appeared to be tried before Lord Chief Baron *Dodd*, the 4th of *July*, 1715, and a verdict and judgment for the plaintiff ; and therefore I am apt to think, that Chief Baron *Dodd* did determine this point.

But our opinion seems to be so agreeable to the intent, as well as the letter of the act, that there is no occasion for authorities.

D

And

TRINITY TERM, 16 & 17 Geo. 2. 1743.

And we are all of us clearly of opinion, that judgment ought to be given for the plaintiff.

Note. That by a rule, made a few days before the delivery of this resolution, the judgment was to be entered as of the 11th of May, when this cause was argued *nunc pro tunc*, the plaintiff being drowned between Easter term last and this term, and no one ought to suffer by the delay of the court, whilst they were deliberating what judgment to give, according to *Baller* and *Delander*, *Trinity*, 1 Geo. 1. *B. R.* and *Cumber and Wane*, *Easter*, 7 Geo. 1. *Strange* 426. and *Craven and Handley*, *Michaelmas*, 11 Geo. 2. *C. B.* in Sir *George Cooke's Cases of Practice* 143.

Hilary

H I L A R Y T E R M,

17 Geo. 2. 1743.

The King *against* John Gibson.

Friday, 3d of February.

THE defendant being indebted to the King in a large sum of money on several bonds for the duty on coaks, an extent issued against him on the 17th of June, 1742, whereon some of the defendant's effects were seized, but a considerable part thereof being secreted, could not be discovered before the return; another extent was sued out, tested the 7th of July following, and by an inquisition it was found that several of the defendant's goods came to the hands of *William Cross*, which he had sold for seventy pounds; and a *scire facias* was sued out against *Cross*; but a commission of bankruptcy having issued against the defendant, and the commissioners having made an assignment of his goods, chattels, debts, &c. to *Cross*, after issuing the first, and before issuing the last, extent, the proceedings thereon were become of no effect.

A second extent tested after an assignment under a commission of bankruptcy, and all proceedings thereon, were quashed and set aside, but liberty given to move for a new extent of the same teste as the first, which was antecedent to the assignment, upon notice of motion.

D 2

Mr.

Mr. Attorney General therefore moved, that the last extent, tested the 7th of *July*, and all proceedings thereon, might be quashed and set aside, and that a new extent, tested the 17th of *June*, 1742, might be awarded against the defendant, that being the time when the *fiat* for it was obtained.

The court ordered the last extent, tested the 7th of *July*, and all proceedings thereon, to be quashed and set aside ; and Mr. Attorney was at liberty to move for a new extent, tested the 17th of *June*, 1742, upon notice of motion.

Saturday, 11th of February.

A new extent ordered of the same teste as the former, upon several precedents and notice of motion.

Mr. Attorney general, pursuant to the liberty given him, moved the court on the behalf of his majesty, that a new extent might be awarded against the defendant, tested the 17th of *June*, 1742, as all his effects which were not seized on the said former extent would be covered, by the assignment in the said order mentioned, from any extent that might be sued out, unless so tested.

Upon reading an order of the 9th of *February*, 1711, between the *Queen* and *Ellins and Farrington*; and another order of the 19th of *July*, 1712, between the same parties ; and another order between the *King* and *Bowdage*, 28th of *November*, 1717 ; by which orders it appeared, that new extents, bearing the same teste as the first extent, had been awarded in the said several cases ; and on reading two affidavits,

affidavits, and notice having been given of the motion to the clerk in court for *William Cross*, in the said order of the third instant named, the court ordered a new extent to issue against the defendant for the debt due to his majesty, tested the said 17th of June, 1742, as prayed.

E A S T E R T E R M,

17 GEO. 2. 1744.

The Attorney General *against* Joseph Chitty,
Esquire.

I Delivered the opinion of the court on the 30th of April, in this term, after the cause had taken up several days in hearing in Michaelmas and Hilary terms last, and had been adjourned for further consideration to this term, as follows.

This is an English information exhibited by Mr. Attorney General, on behalf of his majesty, against the defendant, to have an account

fins, by the old book of rates, annexed to the act of tonnage and poundage, 12 Car. 2. c. 4. And the same duty continues unaltered by the additional book of rates annexed to the act 11 Geo. 1. c. 7.

of the surplus duty for the raisins imported by him, by the name of *Lexia raisins*, as and for *great raisins*, he having only paid the duty laid on them by the additional book of rates, as for raisins not otherwise rated.

And the general question in the cause is, whether the raisins imported by the defendant, by the name of *Lexia raisins*, are rated and to pay duty as *great raisins*, by the old book of rates annexed to the act of tonnage and poundage, 12 Ca. 2. c. 4. or are only to pay duty as raisins not otherwise rated by the additional book of rates, annexed to the act of the 11th year of his late majesty King *George* the First, c. 7.?

By the old book of rates.

s.	d.	
Raisins great, the hundred weight,	10	$2\frac{7}{45}$
containing 112lb. are rated at		
1l. 10s. pay duty		

Raisins of the sun, the hundred weight, containing 112lb. are rated at 2l. pay duty	12	$0\frac{6}{5}$

Raisins of <i>Smyrna</i> black, the hundred weight, containing 112lb. are rated at 1l. pay duty	8	$3\frac{8}{5}$

Raisins of <i>Smyrna</i> red, the hundred weight, containing 112lb. are rated at 1l. pay duty	8	$3\frac{8}{5}$

And all other raisins not rated were to pay duty according to the value.

By

By the additional book of rates.

	s.	d.
Raisins of <i>Alicant, Denia, and other</i> raisins not otherwise rated, the hundred weight containing 112lb. are rated at 10s. pay duty	6	$4\frac{2}{5}$
Raisins of <i>Lipra or Belvadera</i> , the hundred weight, containing 112 lb. are rated at 11s. pay duty	6	7

It is clearly proved by the depositions taken in the cause, that *Marabella* and *Estapona* are ports within the jurisdiction of *Malaga* in *Spain*, and that there are but two sorts of raisins imported from *Malaga*, the one in *Spanish*, called *Passa Lexia*, *Passa* being the *Spanish* word for raisins, and *Lexia* the *Spanish* word for a lye they are dipped and cured in, and in *England* these raisins are called *Malaga* raisins.

And the other sort, in *Spanish*, is called *Passa de Sol*, and these raisins are cured by drying them in the sun, and in *England* they are called raisins of the sun.

If then there are but two sorts of raisins imported from *Malaga*, and one sort is particularly rated as raisins of the sun, we must see how the other sort ought to be rated.

Raisins cured in a lye, and imported from *Malaga*, have been considered, both by the merchants

merchants and at the custom house, as great raisins, and have paid the duty as such, till Mr. *Chitty* entered them by the *Spanish* name of *Lexia*, and paid the lower duty.

It appears by Sir *Joseph Hodges*'s books, in which many of the entries were made by Mr. *Chitty*, whilst he was clerk to Sir *Joseph*, that raisins of this sort were called *Malaga*, or *Lexia*, and were entered at the custom house as *Malaga*, and paid the higher duty; and this is confirmed by the custom house books in many instances.

It is also proved by several merchants, as well as custom house officers, that raisins cured in a lye, and imported from *Marabella* or *Etapona* were esteemed great raisins, and paid duty as such; and the sense of merchants (who are to pay the duty) has great weight with us in the determination of this cause.

Mr. *Samuel Stanton*, one of the defendants Witnesses, in his deposition mentions the fruit commonly called or known in *England* by the name of *Lexia*, otherwise *Malaga* frails, or frail raisins; imported from *Malaga*, and the adjacent ports, as one and the same sort of fruit, and that it is cured in the same manner as raisins called *Alicant* or *Denia* raisins are cured.

And Mr. *Chitty*, by his answer, has shewn from whence all the raisins in question came; for, he says, they came from *Marabella* or *Etapona*,

Eftapona, and that he never imported raisins but from those two places.

The case of the crown is further strengthened by the evidence of several merchants and officers of the customs, that they have viewed samples of the raisins seized, and that, in their judgment, they are *Malaga* or great raisins, and ought to pay duty as great raisins.

How is this evidence answered? Mr. Stanfield says, he viewed the fruit in question, and that they are *Lexia* or *Frail* raisins, and no other fruit; but that expression is ambiguous, and does not import any contradiction to the evidence for the crown, because *Malaga* or great raisins are called *Lexia* or *Frail* raisins.

But, indeed, *John Bromer*, one of the witnesses for the crown, in his cross examination says, that the raisins produced to him were *Lexia*, and not great raisins, to the best of his knowledge and belief.

The raisins now in question (as far as appears) were always entered at the custom house as *Malaga* raisins, and paid the higher duty, till Mr. *Chitty* (who had been privy to Sir *Joseph Hedges*'s entering them in that manner, and yet paying the higher duty) introduced the practice of entering them as *Lexia* raisins, (a denomination unknown to the officers of the customs) and paying the lower duty; and his counsel suppose, that the additional book of rates

rates has made an alteration in the duty of great raisins ; but there is no colour for the supposition, because the additional book of rates only ascertained the duty upon raisins of *Alicant, Denia*, and other raisins not otherwise rated, and upon *Lipra* or *Belvadera* raisins which before paid *ad valorem*, and made no other alteration.

In answer to this case, made by Mr. Attorney general, Mr. *Chitty* has attempted to prove, that raisins of the sort he has imported only paid duty *ad valorem* before the additional book of rates ; and no doubt but such evidence would have been very material for him, but his witnesses have totally failed him, and do not prove a single instance of it.

Mr. *John Kirkpatrick*, Mr. *Abraham Kirkpatrick*, and Mr. *Josiah Chitty*, have heard, and believe, and Mr. *Samuel Stanfield* says, that he has reason to believe, that *Lexia* or *Frail* raisins paid duty *ad valorem* till the additional book of rates, but none of them say, that they ever paid that duty themselves.

But Mr. *Chitty* has proved, by several merchants, that *Denia*, *Xabia*, *Alicant*, and *Altea* raisins, are cured in the same manner as *Lexia*, and by the same merchants ; and by Mr. *Alderman Marshall*, and other grocers, that they are of the same kind, nature, size, goodness, and value ; and by some of them, that they are of better value, and that they give a better price than *Lexia* raisins.

And

And from the expression of great raisins in the old book of rates, and from this proof, the defendant's counsel have drawn several arguments in his favour, which it will be proper to consider.

And it is objected by them, that curing raisins in a lye will not denominate them great raisins, because, at that rate, *Denia*, *Alicant*, and all other raisins cured in a lye, would be great raisins; so that this argument would prove too much; and an argument that proves too much is subversive of itself, and proves nothing.

It was admitted by the King's counsel, that curing raisins in a lye would not denominate them great raisins; and the only reason for proving that the raisins in question were cured in a lye, was to shew, that there were only two sorts of raisins imported from *Malaga*, the one cured in the sun, and the other in a lye, and that those cured in a lye had been always esteemed great raisins by the merchants and at the custom house, and had paid duty accordingly; so that the general expression of great raisins was restrained to raisins cured in a lye, and imported from *Malaga*, and was not applicable to any other sort of raisins.

And that usage will properly explain the words in the book of rates is laid down by Lord *Vaughan*, in the case of *Sheppard and Gofnold*, *Vaughan* 169. Where the penning of a statute is dubious, long usage is a just medium to expound it by; for *Jus et Norma loquendi*

logundi is governed by usage, and the meaning of things spoken or written must be, as it hath constantly been received to be, by common acceptation.

It is then objected, that the description of great raisins in the old book of rates was general, and expressive only of the size or largeness of the fruit, without limitation of any kingdom, country, or place from which it was imported.

I answer, that usage sufficiently applies the description to raisins cured in a lye, and imported from *Malaga*, and excludes all other raisins.

But it is then said, that the raisins in question are proved to be of the same kind, nature, size, goodness, and value, as *Denia*, *Xabia*, *Alicant*, and *Altea* raisins, or rather of lesser value than those raisins which pay the lower duty, and that, therefore, usage ought not to be received to give them the denomination of great raisins, and to subject them to a higher duty, contrary to the letter and meaning of the old book of rates; and to enforce this objection, the defendant's counsel have cited the very next passage in Lord *Vaughan* to that which I have mentioned: The passage is this.

But if usage hath been against the obvious meaning of an act of parliament, by the vulgar and common acceptation of the words, then it is rather an oppression of those concerned, than an exposition of the act, especially as the usage may be circumstanced.

I agree

I agree to this rule, but think the present case distinguishable out of it, because the old book of rates having mentioned great raisins, we must suppose that there were raisins then known and called by that name in *England*; and though the reason of their having that denomination does not appear at this distance of time, yet we are to construe the old book of rates according to the state of things at the time of making it, and not according to any diminution which these raisins have since undergone in size or value: And usage having applied the expression of great raisins to raisins not cured in the sun, and imported from *Malaga*, ought to be received as not contrary to the meaning, though it may now seem to be contrary to the letter of the old book of rates, especially, since if we do not apply these words to this sort of raisins, they must be rejected, not being applicable to any other sort of raisins.

And the new book of rates will afford no argument for the defendant; for if the parliament had thereby intended to have reduced the duty upon these raisins, they would have expressly mentioned *Malaga*, as well as *Alicant*, *Denia*, and other raisins.

But it is then insisted upon by the defendant's counsel, that the parliament intended to raise a tax upon great raisins, whereas if the raisins imported by Mr. *Chitty* were to be rated as great raisins, they could not be imported without loss, and such a construction would amount to a prohibition.

It

It is plain, raisins of this sort were imported for many years, and the higher duty paid; but the value of things varies, and the value of raisins of this sort is diminished, which may be a very good reason for the interposition of the legislature; for that power only which laid the duty can take it off, but we cannot do it by our judgment.

But it is said by Mr. *John Kirkpatrick*, in his deposition, that no raisins were esteemed great raisins in *Spain* but raisins of the sun; but it is plain that raisins of the sun could not be meant as great raisins in the book of rates, because they are particularly rated.

It is also proved by several merchants and grocers, that red *Smyrna* and *Belvadera* raisins are larger than *Lexia* raisins, and that *Lexia* raisins, in their judgment, are not great raisins.

As to red *Smyrna* and *Belvadera* raisins, they paid (except in one instance which I shall mention presently) *ad valorem* before the making of the additional book of rates, and are since particularly rated, and therefore this evidence will not shew them to be the great raisins intended by the old book of rates; and as to the negative evidence, that the raisins in question are not great raisins, it is only matter of opinion, and not founded in fact; for none of these gentlemen ever actually paid the duty *ad valorem* for these raisins before the making of the additional book of rates, and therefore their evidence is greatly over-balanced by the evidence

evidence for the crown, which shews, that raisins of this sort were, both by the merchants, and at the custom house, esteemed great raisins, and paid duty accordingly.

The rest of the evidence offered by Mr. Chitty, either relates to mistakes at the custom house in rating the duty for raisins to the prejudice of the merchant, or in the commissioners of the customs accepting of the lower duty for this sort of raisins.

George Farrel proves an instance in 1707, where his master, Mr. *Richard Freeman*, paid the duty for *Belvadera* raisins as great raisins.

John Bromer proves an instance where Mr. *Solomon Merit* paid the great duty for *Denia* and *Alicant* raisins.

Gobert Sikes proves, that in 1728, he entered *Lexia* raisins as *Malaga*, and paid the duty for them as great raisins; and that about two years after part was returned, which he believes to be the difference: And *John Fowler*, clerk of the certificates, proves it to be the difference.

Samuel Hinton proves, that in 1729, Mr. *Delafontain*, and another merchant, paid the lower duty for *Lexia* raisins.

Two of these instances are modern and *pendente lite*; and *Sikes's* was after the making of the additional book of rates, and is accounted for by the promise of the commissioners of

of the customs to put him upon the same footing with Mr. Chitty, till the dispute between the crown and Mr. Chitty should be determined; but the mistake, or the acquiescence of the commissioners, or the officers, could not bar or prejudice the right of the crown. *Sheffield and Ratcliffe, Hob.* 47. and *Lord Viscount Dunbar's case, Cro. Car.* 349.

I now proceed to the consideration of the hardship of the defendant's case, who will be a great sufferer if he is to be charged with the higher duty, because he has sold his raisins at a price which he could not afford them at if liable to that duty.

This hardship Mr. Chitty has brought upon himself by an experiment which Mr. Merry cautioned him against; but if it had succeeded, would have been a very profitable one to Mr. Chitty, and if it miscarries, he must be content to sustain the loss. *Qui sentit commodum, sentire debet et onus.*

The last objection is, that no sample is produced from 1719 to 1738, and therefore Mr. Chitty (if liable to the higher duty at all) can only be charged with it for those raisins of which samples are produced, for otherwise it cannot appear what sort of raisins paid the higher duty.

It fully appears by the admission in the answer, that all the raisins which the defendant imported were imported from *Marabella* or *Etapona*, and these places being within the jurisdiction of *Malaga*, sufficiently ascertain the duty to be paid for them.

We

We have confidered the words of the old and the additional books of rates, and the evidence read on both fides, with all the care and attention we can, and, upon the whole, are unanimously of opinion, that the defendant ought to account; and on the said 30th of April, 1744, decreed him to account before the deputy remembrancer for the duty of 10s. and 2d, $\frac{1}{2}$ s for every 112lb. of raisins, imported by him during the time in the information mentioned, from *Marabella* and *Etapona*, not being raisins of the sun; and he was to have an allowance of the duties already paid by him, and all other just allowances, with the other usual directions.

The defendant, near three years after the pronouncing of the decree, presented his petition of appeal from it to the House of Lords, but their lordships, after a full hearing of counsel on both fides, affirmed the decree on Tuesday the 24th of November, in the 21st year of the reign of King George the second, 1747.

H I L A R Y T E R M,

18 Geo. 2. 1744.

The King *against* Robert Musters.

Where a defendant pleads a title against the crown, and Mr. Attorney General will not reply or demur in a reasonable time, the court will order judgment to be entered for the defendant, unless the Attorney General, upon issue made, will enter in these three bonds, to pay to the King with Thomas Scott (who was husband of the duty of four and an half per cent. paid in specie in the plantations,) in the penalty of one thousand pounds each, conditioned that Thomas Scott should behave himself well in his office, which is to land the goods (for the charges whereof money is usually imprest to him) and to sell them at a publick auction, and on warrant from the receiver general (who receives the money) to deliver the goods neither to the purchasers.

In Easter term 1742, process of *scire facias* issued against the defendant, as administrator tenanted, will to Francis Musters, on these three bonds; and either enter in Trinity term 1742, the defendant pleaded a nolle prosequi, or proceeded. conditions performed, to which the Attorney general replied nor demurred.

The last day of the term, the court, on motion, ordered, that the Attorney General should

should shew cause at the setting down of causes, why he did not proceed against the defendant on the said *scire facias*.

Mr. Attorney General in shewing cause said, the King cannot be *non prossed*; but that the proper method was, to apply to the Attorney General, and if there was no foundation to proceed, he would stay proceedings, &c.

On the other side, Mr. Smythe cited *the King* and *Embry*, the 9th of *February*, 1724, where, upon *Embry's* pleading a title to lands seized into the King's hands for want of an heir, it was ordered that judgment should be entered to remove the King's hands, and that *John Brooks*, who had also pleaded a title to the premisses, should shew cause, why the said *Embry* should not be put into possession; which was made absolute on the 22d of the same month of *February*.

And *Attorney General* and *May*, 28th of *November*, 1732, on motion for the defendant, ordered, the Attorney General to shew cause why judgment should not be entered on the defendant's plea.

And *the King* and *Davis*, *June 5, 1736*, Attorney General ordered to shew cause why he does not confess or reply to the defendant's plea.

I agree that the King cannot be *non prossed*; court. but think the court may give judgment for the defendant where he has pleaded, and the Attorney General will not reply or demur, and

proceed in a reasonable time, otherwise it would be of bad consequence to the subject, whose witnesses may die. But I think the defendant should first apply to the Attorney General to proceed, which he hath not done here; if he had, and the Attorney General would not proceed, the court may give judgment for the defendant, as if the Attorney General had confessed the plea.

Clarke, Baron—The court have done it; and did so in the case of the recognizances of the *South-Sea* directors; the Attorney General not proceeding, nor caring to consent, being a matter of a publick nature. If the court could not do it, there have been times when such a power of keeping the suit hanging over the defendant, might have been made an ill use of.

Court—Let Mr. Attorney be attended, and the like order on two other writs of *scire facias* against the defendant.

The King *against* Jones.

The court will not order lands seized under an extent, to be excepted out of an extent to issue on a subsequent judgment.

AN extent issued against him, and lands upon an inquisition were seized into the King's hands, and then another creditor obtains judgment upon a *scire facias*.

Mr. Bootle moved, that the lands seised upon the extent, might be excepted out of the extent, to issue upon the subsequent judgment, in order to prevent the vexation of several *Levari's*, and produced a precedent of an extent

*extent ultra terras antea extensas pro debito
prædicto.*

Mr. Attorney General, *contra*—If the prosecutor of the extent has a right to retain the possession of the lands seized upon it, he cannot be evicted until satisfaction; but if the judgment upon the *scire facias* is for a prior debt, the creditor by that judgment ought not to be restrained from suing out an extent against all the lands of the debtor, in order to obtain a preference to the extent already issued, or any advantage subject to it; as by law he may be intitled to one or the other.

The court, in the present state of the case, cannot determine, whether the lands seized on the extent already issued, are liable to be seized on another extent, or not.

And, for these reasons, the motion was denied by the whole court.

Easter

EASTER TERM,

18 Geo. 2. 1745.

The King *against* William Coffins and others.

Estreets
ought not
to be made
on proof by
witnesses
of Misbe-
haviour
committed
out of
court, but
it ought
to appear
by some
act of
court, that
the condi-
tion of the
recogni-
gance is
broken.

AN estreat was made from the quarter fessions in the words following—*East riding of the county of York*: Of *William Coffins*, of *Brompton*, in the county of *York*, gentleman, because he has not been of good behaviour ever since the last general quarter fessions of the peace held for the said riding, the fourth day of *October* last, before *James Gee*, Esquire, *Sir Joseph Pennington*, and other justices of our said Sovereign Lord the King, assinged to keep the peace in the said riding, and also assinged to hear and determine divers felonies, trespasses and other misdeeds committed in the said riding, and whereby the said *William Coffins* undertook to appear here this day, and in the mean time to be of the good behaviour: And it being proved here this day, in open court, upon the oath of two witnessses, that since the last general quarter fessions of the peace held for the said riding, that the said *William Coffins* had been guilty of misbehaviour.—100l.

Of

Of *Richard Casis*, of *Sandon*, in the said county of *York*, yeoman, one of the pledges of the said *William Coffins*, because the said *William Coffins* did not perform the condition of the said-recognition as above.—*50l.*

Of *Richard Bewick*, of, &c. another of the pledges, &c.—*50l.*

Mr. *Perrott* moved to discharge this estreat, as illegally made, upon proof by two witnesses, that *Coffins* had misbehaved; and insisted, that the sessions, in a summary way, could not try the fact of misbehaviour committed out of court; but the recognition ought to have been removed into this court, and a *scire facias* sued out, and a breach assigned, which *Coffins* and his pledges might controvert by pleading to the *scire facias*; and he cited 4 *Inst.* 180, 181. *Cro. Car.* 458. *The King against Hayward and others*; and 1 *Roll. Abr.* 900.

But he said, that if a recognition is given for appearance at the assizes or sessions, and the party, upon being called, does not appear, the recognition ought to be estreated; because it appears by the acts of the court, that the condition is broken.

And he mentioned the last paragraph in the statute of 3 *Hen. 7. c. 1.* That justices of the peace shall certify every recognition to the next sessions, and if the party makes default it is to be recorded, and the recognition to be certified into chancery, the King's Bench, or Exchequer.

Mr.

Mr. *Bootle, contra*, cited *Lane* 55. to shew, that *Coffins* and his pledges might discharge themselves by pleading to the estreat, if he had not been guilty of a breach of the peace or misbehaviour, and that therefore they are not hurt.

But the court held the present application by motion to be proper, and that *Coffins* and his pledges had no occasion to plead to the estreat; and accordingly discharged the estreat as illegally made, but without prejudice to any further prosecution which by law might be upon the recognizance.

Hilary

HILARY TERM,

19 Geo. 2. 1745.

Attorney General *against* John Lade, who prays
liberty to enter his claim.

Middlesex. BE it remembered, that Sir Upon an information of seizure of British and foreign coins, there is no occasion for a writ of appraisement, or a second proclamation; and judgment may be for the coins themselves.

Of several parcels of gold and silver coin seized by John Slater as forfeited, and recovered for the use of his majesty's Attorney General, who prosecuteth for his said majesty, being present here in court the twenty-third Day of January in this term, in his proper person doth, on the behalf of his said majesty, inform this court, that John Slater, an officer of his majesty's customs, between the first day of February last past, and the said day of the exhibiting of this information, at Ratcliff in the county of Middlesex, within the port of London, did seize to the use of his said majesty, as forfeited, several pieces of gold and silver coin of this realm of Great Britain, (that is to say), two hundred and ninety-four pieces of gold coin called guineas, ninety-two pieces of gold coin called half guineas, and several pieces of silver coin of the value of one hundred and thirty-five pounds eleven shillings; and also several

several pieces of foreign gold coin, (that is to say), thirty-four pieces of gold coin called moidores, six pieces of gold coin called half moidores, four pieces of gold coin called quarter moidores, three pieces of gold coin each of the value of three pounds twelve shillings, thirteen pieces of gold coin each of the value of one pound sixteen shillings, three pieces of gold coin each of the value of eighteen shillings, and four pieces of gold coin each of the value of nine shillings, of the goods and chattels of persons to the said Attorney General unknown; for that the said several pieces of gold and silver coin of this realm, and also the said several pieces of foreign gold coin, within the time aforesaid, at *Ratcliff* aforesaid, in the said county of *Middlesex*, within the port of *London* aforesaid, were found by him the said *John Slater*, in the keeping of a certain person or certain persons unknown, that was or were passing out of the said port, and also out of *Great Britain*, into parts beyond the seas, being over and above the reasonable expences of the said person or persons, without the special licence of his said majesty for that purpose had, and without any entry made of the said foreign coin, or any part thereof, in the custom-house of the said port, contrary to the form of the statutes in that behalf made and provided; by reason whereof the said several pieces of gold and silver coin of this realm, and also the said several pieces of foreign gold coin, became forfeited: Wherefore his majesty's said Attorney General, for his said majesty, prayeth the judgment of the court in the premises, and that the said several pieces of gold and silver coin of this realm, and also the said several

several pieces of foreign gold coin, may for the reasons aforesaid remain forfeited, according to the form of the said statutes. Whereupon proclamation being made for his said majesty, as the custom is, that if any one would inform the court here, why the said several pieces of gold and silver coin of this realm, and also the said several pieces of foreign gold coin, should not, for the reasons aforesaid, remain forfeited, he might come, and he should be heard; and no one appearing to do this, It is adjudged by the barons here, that the said several pieces of gold and silver coin of this realm, and also the said several pieces of foreign gold coin, do, for the reasons aforesaid, remain forfeited; and that the said *John Slater* be charged towards his said majesty with the said several pieces of gold and silver coin of this realm, and also with the said several pieces of foreign gold coin, and shall satisfy his said majesty thereof, by pretext of the said statutes, and of other the premisses.

The information and judgment are founded on the 5 Rich. 2. Stat. 1. c. 2. and 2 Hen. 4. c. 5. which prohibit the exportation of coin generally, without licence; and on 15 Cha. 2. c. 7. s. 11. which allows the exportation of foreign coin, upon entry.

Mr. Starkie, at the sittings after the term, moved to set aside the judgment for the condemnation of the several pieces of *British* and foreign coin before mentioned; and objected to it as irregular.

First,

First, Because no writ of appraisement has been sued out.

Secondly, Because there is no second proclamation, to shew cause why these coins should not remain forfeited ; and for a bidder to come in, and bid more than the appraised value.

Thirdly, That the judgment should have been for the value, and not for the coins themselves.

Fourthly, But supposing the judgment regular, yet that Mr. *Lade* ought, by the discretion of the court, to be let in to claim and try the merits, and not be concluded by this judgment.

Mr. Attorney General, and others, insisted on the regularity of the judgment ; and that Mr. *Lade*, on the particular circumstances of this case, ought not to be admitted to claim.

The court ordered precedents to be searched, and delivered to them.

ADJOURNED.

Easter Term, 19 Geo. 2. 1746:

I delivered the opinion of the court on the 9th day of *May*, in this term ; and observed, That in order to settle these several points, search had been made into the original of writs of appraisement and proclamations in this court, pursuant to our order, by the clerks in court on each side, and that they had delivered to us copies of all precedents they could find upon the most diligent search.

The

EASTER TERM, 19 Geo. 2. 1746.

The first question is, Whether it was necessary to sue out a writ of appraisement in this case?

There were few seizures till about the 24th of Ed. 3. when acts passed concerning the duty on wool and Woolfels, and afterwards upon the woollen manufacture.

The first writ of appraisement of goods seized, that can be found, is *Hilary*, 4 Hen. 5. Roll. 13. by which the commissioners were directed, first to make proclamation for any claimer to appear in this court at the return of the writ of appraisement, and to make his claim here.

The first instance of a proclamation in court, that can be found, is *Michaelmas*, 13 Hen. 6. Roll. 4. and many condemnations appear in the old records upon a single proclamation.

The first instance of a second proclamation for a bidding, is *Michaelmas*, 18 Ed. 4. Roll. 15. a seizure of a parcel of gold tissue, and the goods are appraised in court by two merchants of *London*: and the second proclamation is, if any one will give more for the goods than they were appraised at, &c. A bidder comes in, the goods are sold, and he is charged with the price.

Upon consideration of these, and many other ancient records, as well as of the case which I shall presently mention, I apprehend, that the method of appraising and selling was invented and established, when it came to be experienced,

experienced, that it was very troublesome to the crown and its officers to have judgment for the goods themselves, of which they could not make the same advantage as merchants and tradesmen could; and for this reason it has been the general use ever since the invention of it, to have a writ of appraisement, and a second proclamation: as being more beneficial to the crown and officers than having the goods in specie; but still where the forfeiture of the coins or goods is given to the crown only, or to the crown and informer, they may have the specific coins or goods, at their election.

• *Russell's case, Michaelmas, 1684, from an authentic manuscript of an eminent practiser, who was counsel in the cause.*

This case was upon a bidding above the appraised value of the goods, seized as prohibited and uncustomed; and upon proclamation, that if any would give more, &c. *Russell* offered to give more, (to wit) such a sum; and upon debate of the case, these things were resolved by the court, and assented to by *Sawyer, Attorney General*, who was counsel against *Russell*—

First, That such bidding is the ancient practice, and may be greatly advantageous to the King, to prevent under appraisements.

Secondly, That such bidder shall have the moiety of the King for the price bidden, if the King does not elect to have his moiety in specie, which it was allowed he might do, and

and the bidding does not alter the right and election of the King ; and when the bidder has the moiety of the King only, the judgment is, that the bidder should be charged to the King, for so much for the King's moiety, and that the informer should retain the other moiety, according to the form of the statute ; and this is according to a precedent, *Easter*, 4 Hen. 8. *Roll.* 9. in the King's remembrancer's office, and if the King chooses to have his moiety in specie, there is no need of a second proclamation : And in that case other points were determined, not material to the present purpose.

Friday the 28th of October, 10 W. 3, 1698.
Upon the motion of Mr. Attorney General for the King ; To prevent abuses relating to the importation of *French* goods, Mr. Attorney General, on the behalf of his majesty, doth elect, that his majesty's moiety of all *French* goods, and of all wines seized as forfeited, shall be taken for his majesty's use in kind ; which is ordered by the court to be observed accordingly.

I will make some observations on the second resolution in *Russell's* case, that the King has a right to take his own moiety in specie, if he pleases ; but neither the case nor rule of 1698, go so far as to point out when, or in what manner, the King's pleasure is to be signified ; though at the end of that resolution, it is said, that if the King chooses to have his moiety in specie, there is no need of a proclamation ; that is, (as I understand it), a second proclamation ; from which I think it a natural inference, that the King's pleasure shall somehow

or

or other be made known; and as Mr. Attorney General is by his office intrusted to carry on these prosecutions, I think it a sufficient notification of the King's pleasure, that Mr. Attorney has taken this particular method of prosecuting for the condemnation of the coins themselves.

If this be so, what occasion can there be, in the present case, where the King is intitled to all the coins, both *British* and foreign, in specie, for a writ of appraisement? For the use of the writ is not to ascertain the several coins, they are already described in the information: Or what occasion can there be for a valuation of the foreign coins, when the King is determined to take the foreign coins in specie, let them be of what value they may, and only desires a judgment for the condemnation of them?

It is certain, and Mr. Lade's counsel agree it, that there is no occasion for a writ of appraisement where the seizure is of current coins of the kingdom: But they insist, that as this information is for foreign as well as *British* coins, that there ought to have been a writ of appraisement, at least for the foreign coins; because, according to *Cro. Eliz.* 536. *Telv.* 80.
1 *Jo.* 69. *Palmer* 427. 5 *Mod.* 7. *Moore* 775. Courts of justice can no more take judicial notice of the value of foreign coins not made current by proclamation, than they can of the value of bullion, or any goods or merchandize. And yet the value of the pieces of coin in this information are as well known (provided they have not been filed, or otherwise diminished by

by ill practice) among merchants, traders, and others, and pass at as certain a stated value as guineas do, except at the exchequer and the bank they do not ordinarily receive them; and I believe some bankers when they receive them, give notes to pay in the same coins..

This brings me to the precedents; and here are five where foreign coins are condemned in this manner, and seven where there were writs of appraisement.

But it was observed by Mr. *Lade*'s counsel, upon the precedents produced for the crown, that one of them was for *French* crowns and *Spanish* ryals, another of them for dollars, and the other three for foreign coins generally.

And as to *French* crowns, *Spanish* ryals, and dollars, that they were made current by proclamation, and therefore no authorities against them; and they cited *Wade's* case, 5 *Rep.* 114. a. b. where it is said, that *Spanish* shillings and double pistoles were made current by proclamation, as were *French* crowns.

But I cannot find that *Spanish* ryals and dollars were made current by proclamation, and I rather incline to think they were not, because in the first precedent produced on behalf of Mr. *Lade*, Mich. 12 Cha. 2. the seizure was for dollars, and a writ of appraisement to value them, which there would be no occasion for if current; and if not current, these two precedents for the crown are not answered.

The other three precedents are for foreign coins generally ; and Mr. *Lade's* counsel insist, that the court must intend these to be foreign coins current, because according to the rule in *Metcalf's* case, 11 Rep. 38. b. where a thing is indefinitely mentioned in a record, the principal thing and most worthy shall be intended ; and therefore it shall be intended foreign coins current, as that is more worthy than foreign coins not current, but this would be to proceed upon a very uncertain conjecture, when it is well known that there are more foreign coins not current, than there are foreign coins made current by proclamation.

But if *Ruffel's* case be law, that the King (if he pleases) is intitled to the coins in specie, and it is confirmed by the rule in 1698 ; my reasoning (I think) plainly shews, that there is no more occasion for a writ of appraisement in this case, because some of the coins are foreign not made current, than if all of them had been *British* coins.

The second question is, Whether there ought not to have been a second proclamation ; which is not only to shew cause why the coins should not remain forfeited, but for a bidder to come in and bid more ?

The second proclamation depends upon the writ of appraisement, and where there is no writ of appraisement, there can be no occasion for a second proclamation ; because it would be absurd to ask any man whether he would

would give more for goods, without telling him what was the present value of them. There is no instance of a second proclamation where no writ of appraisement was sued out.

The third question is, Whether judgment should have been for the coins or the value?

I think the judgment is right for the specific coins, as they are forfeited: And Mr. Attorney General has proceeded in this manner for the condemnation of them.

There are many instances of recoveries where informers are charged with the things themselves, *Trin. 7 Hen. 5. Roll. 2. Hil. 5 Ed. 4. Roll. 39. Mich. 13. Hen. 6. Roll. 4.* and several others.

So is the precedent, *Mich. 2 & 3 Pb. & M. Roll. 15.* Judgment for the forfeiture of coins, and the officer to be charged to the King and Queen for a moiety.

Easter, 15 Cha. 1. Roll. 9. The like judgment. *Mich. 2 Geo. 1. Roll. 55.*

The precedents for Mr. Lade were of writs of appraisement; that the specific coins remain forfeited, and that the officer be charged with one moiety, or the value, or with a moiety of the price or value, to the crown.

But there seems to be a difference between a proceeding upon the acts of *Rich 2.* and *Hen. 4.* where the coins are forfeited to the crown ; and upon the act of tonnage and poundage, 12 *Cha. 2. c. 4. s. 3.* which says, the goods shall be forfeited to the King, one moiety of the rate thereof to the King, the other to him who shall seize and sue for the same : Here a moiety of the rate seems to import a moiety of the value, and on this act a writ of appraisement seems to me to be proper ; but this clause only relates to wines, goods, or other merchandize, and not to coins.

And besides, this can only be a question between the crown and officer, and Mr. *Lade* has no pretence to make the objection.

The precedents produced for Mr. *Lade* do not impeach those produced for the crown, but all of them are reconcileable according to the resolution in *Russell's case*, that the King, upon seizures where he is intitled to the goods seized, may take them in specie if he pleases, or have them appraised and sold, and take the value instead of themselves ; and therefore I agree to that resolution.

The last question is, supposing the judgment regular, Whether Mr. *Lade* ought not, by the discretion of the court, to be let in to claim and try the merits, and not be concluded by the judgment ?

Lord

Lord *Hale*, in a treatise of ports and port duties, and of the customs, (not printed), lays it down as clear law, that the King may inform upon a *devenerunt* in what court he pleases; but there cannot be an information upon a seizure to condemn goods by proclamation, but only in the court of exchequer; and the reason is, because upon all such seizures every person concerned may have and know a certain place to resort unto for his remedy in this kind.

I observe, that Mr. *Lade* has not ventured to swear that he did not know it to be necessary to enter a claim in this court, and yet, by the seizure, he had notice to do some act to preserve his property; and it is generally known to traders and masters of vessels, that they are to resort to this court for redress upon such occasions, and there was a proclamation in open court for any one to come in and claim; but supposing him to be ignorant that a claim was necessary, his ignorance will by no means excuse his omission to make it, because it was gross negligence not to inform himself that it was necessary, since such information might easily have been had.

In *Richard and Boyle*, 27 Nov. 1695, a claimer was admitted to enter his claim after a recovery; and I presume, that it was a regular recovery, because the court put terms on the claimer; to plead to issue forthwith, to take short notice of trial, to bring no writ of error, and in case of a verdict for the King, the judgment to stand as a security; otherwise the recovery was not to be vacated.

This

This case, at first view, seems to be a strong authority for Mr. *Lade*; but here, as the officer has paid the money into the exchequer, he cannot get it back if Mr. *Lade* should prevail against him: Indeed, if he had been irregular in his proceedings, he would have paid at his peril; but as he is regular, and has done his duty, I do not think it reasonable to expose him to the danger of having this money recovered from him by Mr. *Lade*; for if he should prevail, in that case the officer must unavoidably bear the loss, and be remediless.

The whole court held the judgment to be regular, and that it ought not to be set aside, but to stand, as this case is particularly circumstanced.

Robert Foster, who, &c. *against* Joseph Cockburn, claiming the property of a ship, and a parcel of Spanish wines and raisins seized by the plaintiff.

Upon a seizure of perishable goods, the court has a discretionary power to order a sale, without the consent of the claimer; but cannot order the goods to be sold after judgment, pending a writ of error.

MR. Attorney General moved, on the behalf of his majesty and the plaintiff, the last term, that the goods in question might be publicly sold by the commissioners of the customs, for the most money that could be got for them; and that the money arising by the sale might be deposited in the hands of the warehouse-keeper, at the custom-house in the port of London, subject to the further order of the court.

He

He stated the case to the following effect: That these goods were seized in *July 1744*, and deposited in a warehouse at *Rochester*; that the wines had received considerable damage, both in quantity and quality; that the raisins were greatly decayed and perished, and, unless sold, they would in a few months time become of little or no value; that the plaintiff had laid out for the warehouse, cooperage of the wines, and other expences about the goods, above two hundred pounds; and if the goods remained in the warehouse till *Trinity term next*, he must necessarily be at the further expence of thirty pounds and upwards; that he had obtained judgment upon demurrer to the defendant's plea, but that the defendant had brought a writ of error.

And upon reading the plaintiff's and two other affidavits, and hearing Mr. Solicitor General on the same side, and Mr. Starkie for the defendant, the court made an order on the defendant, to shew cause according to the motion; and on the 24th of *February* Mr. Starkie shewed cause, and made several objections; and Mr. Attorney was heard in reply: And the court took time to consider of what had been offered on both sides till the 9th of *May* in this term, when I delivered the opinion of the court.

The question is, Whether the court can order perishable goods to be sold, at the instance of the Attorney General and the plaintiff, without the consent of the claimer?

And

And as to the objection, that there was no instance of such an order without consent ; but that in *Martin and Le Ferque*, 17 July 1742, the motion for the sale of the brandy seized, and to have the money brought into court, subject to further order, was denied ; it was observed, that there was no affidavit in that case. *Savage and Steward*, 25 June 1742, was cited to the contrary ; that pickled salmon was ordered to be sold, being perishable, upon an affidavit. But as it does not appear by the minutes upon what ground the court proceeded in these cases, they can have but little weight on either side.

But I will shew, from the reason of several authorities which have not been mentioned, that a discretionary power is necessarily inherent in the court in all cases of this nature, for the benefit of the parties interested in the event of them. *Eyston and Studd*, *Plowd. Com.* 465, 466. 2 *Inft.* 168. Wreck by *Westm.* 1. c. 4. is to be kept by the view of the sheriff, coroner, &c. for a year and a day, and if they do otherwise, they are to be awarded to prison ; yet if there are perishable goods, the sheriff may, according to the sense of the act, sell within the year, even contrary to the express letter of it.

The King may, by 27 Ed. 3. *stat.* 2. c. 13. seize goods taken by pirates, where the property is unknown, and detain them until proof of property is made ; and if they are perishable goods the King may sell them, and, upon proof, restore the value. 12 Co. 73.

Baker

Baker and Baker, 1 Ventr. 313. Where there is a dispute in the ecclesiastical court about administration, the ecclesiastical court may, on the principle of necessity, provide for the disposition of perishable goods *pendente lite*.

And we were clearly of opinion, that we should have had power to order a sale of perishable goods, without the consent of the claimer, if no writ of error had been brought.

But we thought our power to order a sale was suspended, and transferred to Lord Chancellor, pending the writ of error.

And because our power was suspended, and it did not sufficiently appear that the goods in question were perishable, we discharged the order to shew cause, and refused to make it absolute for sale of them.

Hilary

wapentakes, rapes, wards, or other divisions, or any two or more of them, are authorized and required to cause the several proportions charged on the respective hundreds, lathes, wapentakes, rapes, wards, or other divisions, as aforesaid, for or towards the aid hereby granted, to be equally taxed and assessed within every such hundred, lathe, wapentake, rape, ward, or other division, and within every parish and place therein, according to the best of their judgments and dispositions.

That by these clauses, the commissioners had a discretionary power, unrestrained by the proportions assessed under the land-tax act, 4 W. & M. for the words—"or other divisions"—mean other large divisions of the same kind as are before enumerated, and exclude parishes; as may be plainly collected from the subsequent words—"and within every parish and place therein."

That the words of reference to the proportions in 1693, only governed as to the sums charged on divisions, and not on parishes; there being no parochial division within the intent of the act, for the reason before offered.

That the commissioners at their general meeting had acted with great justice and equality, by easing those who were over-burthened, and laying it upon those who were under-rated; and that the commissioners had exercised no other power than had been formerly exercised.

To

To shew which, several duplicates were read, from the year 1693 to 1707, whereby several variations appeared to be made in the gross sums charged upon the inhabitants of St. James and St. Anne.

That by the words “according to the best of their judgments and discretions” the act intended some discretionary power to the commissioners; but without this power they would have none at all, but be mere cyphers.

The counsel for the parishes which had been eased also insisted, that the court had no jurisdiction in this case; for by a clause in fo. 43. all questions and differences which shall arise touching any of the said rates, duties, and assessments, shall be heard and finally determined by the said commissioners, in such manner as by this act is directed, upon complaint thereof made to them by any person or persons thereby grieved, without further trouble or suit in law in his majesty’s court of King’s Bench, or any other court whatsoever.

Mr. Attorney, Mr. Solicitor General, and others, *è contra* argued, that for the better understanding of the questions before the court, it would be necessary to recur to the original commencement of this sort of land-tax in 1693, and to trace it from thence through its several alterations, and the occasion of them; whereby it would appear, that the 4 W. & M. did not direct any particular sum to be raised upon any county, &c. but only four shillings in the pound; but that by the 9 & 10 W. 3. and the subsequent

subsequent land-tax acts, particular sums were charged on each county, &c. that from the 4 W. & M. the commissioners had a discretionary power to settle proportions till the 10 & 11 W. 3. when the proportions charged under 4 W. & M. having been departed from in several counties, &c. the clause of reference to the proportions under 4 W. & M. was first introduced, and the deficiencies directed to be made good according to those proportions: That the same clause of reference having been in all subsequent land-tax acts, the commissioners are to govern themselves by that rule; and if it occasions any hardship or inequality, the legislature only can rectify it. That by the duplicates returned into the King's remembrancer's office under the act of 4 W. & M. and which are warranted by the express letter of that act, and by the subsequent duplicates, parishes and even parts of parishes had been considered as divisions within the intent of the land-tax acts, and that the words "or other divisions, and within every parish and place therein," do not exclude parochial divisions, but only relate to divisions consisting of several parishes; and that a different construction would occasion the utmost confusion. That the commissioners undoubtedly had a discretionary power to relieve particular persons over-rated; but were restrained from altering the proportions, either in parochial or other divisions.

They then read the clause in the 4 W. & M. fo. 151, 152. The commissioners by all lawful ways and means shall have power to examine into the estate of such persons, and the value of such premises chargeable by this act, and to set

set such rate and rates upon the same as shall be according to the intent of this act. Assessors to give a copy of their assessment to commissioners, and the commissioners to cause the same to be fairly written, and to sign and seal duplicates, &c. And moreover, the commissioners shall cause a true extract or copy of the whole sums assessed and charged within every hundred, lathe, wapentake, parish, ward or place, rated or assessed pursuant to this act, and of the whole sums rated or assessed upon personal estates, offices or employments; to be certified and transmitted into the exchequer, under the hands of two or more of the commissioners, but without naming the persons in such their certificates.

And the same discretionary power of charging proportions is continued in the subsequent acts, and particularly in the 9 & 10 W. 3. fo. 269. (which last act only granted a three shillings aid) without reference to the proportions in 1693, till the act of the 10 & 11 W. 3. which first introduced it.

By the 10 & 11 W. 3. fo. 154. (which was read, and only granted an aid of three shillings in the pound) It is provided, that the commissioners shall have power to ascertain and set down in writing the several proportions which ought to be charged on every hundred, lathe, wapentake, rape, ward, or other division respectively, for and towards raising and making up of the whole sum by this act charged upon the whole county, city, or other place, for which they are hereby named commissioners; having

having regard, in proportioning the same, to set down and ascertain three-fourth parts of the entire sums which were assessed on the same hundreds or divisions respectively by virtue of 4 W. & M.

Fo. 206. of the same act, reciting that different proportions had been charged, enacts, That where such different proportions have been charged upon any such hundred or division, by such several general meetings as aforesaid, and in such cases only, the same shall be rectified, by charging in every such hundred and division three-fourth parts of the sum which was charged thereupon to the aid granted 4 W. & M. And the commissioners for every such county and riding, and for the respective hundreds and divisions therein, shall take care that the said proportions be regulated, charged, levied and raised accordingly ; and if any deficiency shall remain nevertheless, in raising the entire sum charged by the said act upon the whole county or riding where such hundred or division doth lie, such deficiency shall be made good in such hundreds or divisions of the same county or riding as are not fully charged with the like proportion of three-fourth parts of the said former aid ; so as the full sum charged by the said act upon the whole county or counties, riding or ridings before mentioned, shall be fully paid and answered to his majesty's use, according to the true meaning of the said act, although the rate thereby upon any lands, tenements, or other things, do or may exceed three shillings in the pound ; any thing to the contrary notwithstanding.

The

The King's counsel read the clause in the 18th of his present majesty, fo. 60. whereby that part of the parish of *St. Andrew Holborn*, which was formerly subdivided into two divisions, the one above, and the other below the bars, is made one division.

And the clause in fo. 60. whereby the parish of *St. George Hanover Square* is directed to be charged with a distinct *quota*, separate from that of *St. Martin in the Fields*.

They also read the clause, fo. 59. relating to the officers at *Stoke Damrel* near *Plymouth*, which shews the proportion in 1693 to be the governing rule in that instance.

The clause for relieving protestants against the double tax fo. 71. recites that the sums affessed by virtue of 4 W. & M. do not only govern the proportions set upon every county, city, riding, town or other place, hereby charged with a certain sum in this act expressed, but are also to regulate the proportions thereof in every hundred or division respectively.

They also read the duplicates returned pursuant to the act of 4 W. & M. and several subsequent duplicates, whereby these parishes appear to be considered as so many distinct divisions; from whence they inferred, that the proportions charged thereon could not be altered.

And as to the variations of the gross sums charged upon the inhabitants of *St. James* and *St. Anne*, they accounted for them, by what had been taken off upon appeals, and from papists at different times; but they insisted that these variations (if they had not been accounted for) would not have altered the law.

As to the point of jurisdiction; they insisted that the court, from the nature and constitution of it, had a general superintendency over all commissioners and officers concerned in raising or collecting the revenue, and were to enforce a due execution of the revenue laws, and were only restrained by the clause which had been read, from interposing in such matters wherein the commissioners had the final jurisdiction; but not where they exceeded their jurisdiction, or neglected their duty.

That in the 4 W. & M. fo. 168. there is this clause—All questions and differences that shall arise touching any of the said rates, taxes, assessments, or levies, shall be heard and finally determined by the commissioners, in such manner as by this act is directed, upon complaint to them thereof made by any person or persons thereby grieved, without further trouble or suit in the law. But notwithstanding this clause, the court has interposed in a case of this nature: And I cited the case of the town and county of *Southampton*, 20th November, 4 W. & M. where at a general meeting of sixty of the commissioners, a certain sum was charged
on

on the town and county of *Southampton*; afterwards, in the evening, seven or eight of the commissioners met again, and took off eighty pounds, part of the sum, from the town and county of *Southampton*, and charged it on several divisions in the county of *Southampton* at large; and a super set on the county of *Southampton* at large was returned into the court of exchequer: The court discharged the divisions from the super so set, and ordered the eighty pounds to be put in charge on the town and county of *Southampton*, and that process of the court should be awarded to levy it.

The court, for the reasons offered on behalf of the crown, on the 21st of *February* 1746, declared, that the said commissioners ought to have charged the said sum of sixty-three thousand and ninety-two pounds, one shilling and five pence, upon the several divisions within the said city and liberties, in proportion to the sums which were assessed upon the same divisions respectively by the said act made in the 4 W. & M. And it appearing that the following sums ought, according to those proportions, to have been charged upon such divisions respectively; (*viz.*) St. Margaret and St. John the Evangelist Westminster, the sum of 833*1l.* 16*s.* 6*d.* St. Martin in the Fields and St. George Hanover Square, 19,086*l.* 15*s.* 11*d.* St. James 11,173*l.* 2*s.* St. Clement Danes and St. Mary-le-Strand, 5437*l.* 17*s.* St. Paul Covent Garden, 4840*l.* 12*s.* St. Anne 5666*l.* 8*s.* and the offices executed in Westminster-Hall, 8555*l.* 10*s.* and that instead thereof, the said commissioners

have by their duplicates only charged upon the said division *St Margaret* and *St. John the Evangelist*, for the said land-tax for the year 1745, the sum of 5612*l.* 12*s.* and upon the said division of *St. Clement Danes* and *St. Mary-le-Strand* 4196*l.* 7*3d.* and upon the said division of *St. Paul Covent Garden* 3441*l.* 1*s.* 9*d.* and upon the said division of *St. Anne*. 4596*l.* 1*s.* 4*1d.* all which together, with the sums rightly charged on the other divisions, amount in the whole but to the sum of 56,631*l.* 3*s.* 8*d.* which falls short by the sum of 6460*l.* 17*s.* 9*d.* of what ought to have been charged upon and raised within the said four last mentioned divisions. It was therefore ordered that the commissioners within the said divisions of *St. Margaret* and *St. John*, *St. Clement Danes* and *St. Mary le Strand*, *St. Paul Covent Garden* and *St. Anne*, respectively, should forthwith charge, assess and raise, or cause to be charged, assessed and raised, upon the said several and respective divisions for the said land-tax for the year 1745, the sums following; (*viz.*) For the said division of *St. Margaret* and *St. John*, the said sum of 8331*l.* 16*s.* 6*d.* and for the said division of *St. Clement Danes* and *St. Mary le Strand*, the said sum of 5437*l.* 17*s.* and for the said division of *St. Paul Covent Garden* the said sum of 4840*l.* 12*s.* and for the said division of *St. Anne*, the said sum of 5666*l.* 8*s.* according to the directions of the said land-tax act for the year 1745. And that the said commissioners of the four last mentioned divisions should also forthwith deliver, or cause to be delivered, duplicates to the said receiver-general, and transmit, or cause to be transmitted,

the

the like duplicates into the King's remembrancer's office, according to the directions of the said act.

The like orders, *mutatis mutandis*, were made at the same times with respect to the land-tax for the year 1746.

See the orders of the 27th of February 1766, and the 13th of May 1767, touching arrears of land-tax within the north division of *Shebbear hundred*, in *Devonshire*.

MICHAELMAS TERM,

22 Geo. 2. 1748.

The King *against* Young Willes, Esquire, outlawed at the suit of Ann Palmer, Spinst^r, and also at the suit of Thomas Sergison; on two several transcripts of outlawries.

MR. Starkie, of counsel for the said *Ann Palmer*, on Saturday the 12th of November in this term, stated the case between the contending parties, as follows—That the defendant was outlawed in his majesty's court of common lawries, on the 12th of November, 1747, How out-
lawries shall be preferred where the outlawries and inquisitions are upon the same or different days.

common pleas, on *Monday* next after the feast of *St. Luke*, in the twenty-first year of his present majesty's reign, at the suit of the said *Ann Palmer*; and on the 28th day of *November* last, a writ of special *capias utlagatum* had been awarded on the said outlawry, out of the said court of common pleas, directed to the sheriff of the county of *Suffex*, and returnable in the said court on the first return of *Hilary* term last, requiring the said sheriff diligently to inquire what goods and chattels, lands and tencements, the said defendant had in his bailiwick on the said *Monday* after the feast of *St. Luke*, and to seize the same into his majesty's hands. And that by an inquisition taken by virtue of the said writ, the 11th of *January* last, (amongst other things) diverse goods and chattels of the said defendant, appraised at 12*l. 6s. 5d.* were seized into his majesty's hands. That subsequent to the said outlawry at the suit of the said *Ann Palmer*, (to wit) on *Monday* next after the feast of *All Saints*, in the 21st year of his majesty's reign, the said defendant was likewise outlawed at the suit of the said *Thomas Sergison*, in the court of King's Bench; and a writ of special *capias utlagatum* issued out of the said court against the said defendant, his estate and effects, directed to the same sheriff, of the same teste and return with the said *capias utlagatum* at the suit of the said *Ann Palmer*; and the said sheriff, by an inquisition taken thereon, the same 11th of *January* did again seize the same goods and chattels he had before seized on the *capias utlagatum* at the suit of the said *Ann Palmer*, without taking notice of the said former

former seizure. That although the said inquisition taken at the suit of the said *Thomas Sergison*, was on the same day with that taken on the said *Ann Palmer's* outlawry, yet the same was taken, in point of time, subsequent to the said *Ann Palmer's* inquisition; and the sheriff's officer had been in possession of the said goods and chattels on behalf of the said *Ann Palmer*, a fortnight before any possession was taken thereof on behalf of the said *Thomas Sergison*: And that the inquisition taken on the said *Thomas Sergison's* outlawry was totally irregular and illegal. Mr. Starkie further stated, that the said *Thomas Sergison* having procured from the sheriff a return of his said inquisition before the end of *Hilary* term last, did get the same transcribed into this court on the last day of the same term; and on the 7th of *March*, being the seal-day after the said term, did take out a *venditioni exponas* for selling the said goods, returnable the first day of the following term, being the 27th of *April* last; by virtue whereof the sheriff had sold the said goods for 128*l.* 6*s.* 5*d.* and on the 28th of *October* last, the said *Thomas Sergison* obtained an order of this court for the sheriff's paying to him the said 128*l.* 6*s.* 5*d.* And, on the contrary, the said *Ann Palmer* not being able to procure from the sheriff a return of her inquisition till after the end of *Hilary* term last, the same could not be transcribed into this court till the first day of the following term: on which day the said *Thomas Sergison's* writ of *venditioni exponas* was returnable in this court. That the said *Ann Palmer*, soon after her said outlawry was transcribed into this court, having given a proper

per rule for that purpose, did on the 21st of *May* last, cause a writ of *venditioni exponas* to be awarded on her said inquisition, for selling the said goods and chattels, returnable in this court on the 10th of *June* last; but had not been able to procure from the sheriff any return thereon, although the said sheriff had so long ago as the 9th of *July* last, been served with a rule of this court for that purpose: And on the 26th of *October* last, the said *Ann Palmer* had obtained an order of this court for the said sheriff to shew cause why an attachment should not issue against him, for his contempt in not returning the same: That by reason of the said *Ann Palmer*'s not being able to obtain a return of the inquisition taken on her writ of *capias utlagatum* before the end of *Hilary* term last, the said goods had been sold on the *venditioni exponas* taken out, by the said *Thomas Sergison*, before her outlawry could be transcribed into this court; and by the sheriff's not returning the *venditioni exponas* awarded on the said *Ann Palmer*'s outlawry, the said *Thomas Sergison* had by surprize obtained the said order of the 28th of *October* last, for payment to him of the said sum of 128*l. 6s. 5d.* arising by sale of the said goods and chattels, although seized on the said *Ann Palmer*'s outlawry, prior to any seizure thereof on behalf of the said *Thomas Sergison*. And these facts being verified by the process and affidavits, Mr. Starkie moved that the said writ of *venditioni exponas*, awarded the 7th of *May* last on behalf of the said *Thomas Sergison*, might be set aside, and the said order of the 28th of *October* last discharged, and the said sum of 128*l. 6s. 5d.* remaining in the sheriff's

riff's hands, paid to the said *Ann Palmer*. And upon hearing *Sir Thomas Bootle*, Mr. *Hatsell* and Mr. *Miller*, of counsel for the said *Thomas Sergison*, praying a day to shew cause, the court ordered that the said *Thomas Sergison* should shew cause why his said writ of *venditioni exponas* should not be set aside ; and that in the mean time, and till further order, the said sum of 128l. 6s. 5d. should remain in the hands of the sheriff : That the said *Ann Palmer* should forthwith file her affidavits ; and all affidavits to be made use of by the said *Thomas Sergison* should be filed two days before the day of shewing cause.

On the 23d of November 1748, *Sir Thomas Bootle* and the other counsel for *Thomas Sergison*, shewed cause against this order ; and insisted, that the delivery of the *capias utlagatum* to the sheriff was not material, for it did not bind the crown ; that at common law goods were affected from the time of the award ; 1 *Roll. Abr.* 893. pl. 3. that a *capias utlagatum* is the King's suit, and for the subject but in the second degree ; *Sir Thomas Shirley's case*, *Hob.* 115. that the sheriff had no power to dispose of these goods, but by the *venditioni exponas* ; *Stringfellow's case*, *Dyer* 67. *Dr. Drury's case*, 8 *Rep.* 142. and *the King and Capel*, 2 *Show.* 481.

In delivering the opinion of the court, I first observed, that the cases cited by the counsel for Mr. *Sergison*, only shewed what preference the King shall have for his debt ; and that, upon an extent, goods, though in *custodia legis*, may be taken for him before they are delivered

delivered upon a *liberate*. And I mentioned the settled differences taken by Lord Chief-Baron *Ward* in this court, in *Easter* term, 11 W. 3. 1699, as to the preference upon outlawries, from a very authentic manuscript.

First, Where there are two outlawries at different times, the first inquisition shall prevail; this was *Bradnell's* case, *Michaelmas* 36 Car. 2.

Secondly, Where there are two outlawries on one day, the first inquisition shall be preferred; this was *Pain and Dews's* case, *Easter* 21 Car. 2.

Thirdly, Where there are two inquisitions on one day, the first outlawry shall be preferred.

But, Fourthly, Where there are two outlawries on one day, and both inquisitions on one day, there the first lease shall be preferred.

And the order to shew cause was made absolute.

Hilary

H I L A R Y T E R M,

22 Geo. 2. 1748.

Attorney-General against Thomas Munn.

THIS was an information by *William Williams*, a custom-house officer, on a seizure of several parcels of tobacco stalks as forfeited, by being imported contrary to the act 12 Geo. 1. c. 28. s. 13. The defendant claimed property, and gave security in the penalty of thirty pounds, to answer costs pursuant to the act 8 Ann. c. 7. s. 76. and, by plea, denied the supposed act of forfeiture. And issue being joined, there was a verdict for the King.

The Attorney-General moved, that the deputy-remembrancer might tax the bill of costs delivered to the defendant's clerk in court, and that after taxation the recognizance might be put in suit against the defendant's security; and cited several precedents from the year 1729, and insisted that the recognizance extended to costs occasioned by any claim.

Mr. *Perrott*, for the defendant and his security, answered, that the act of the 8th of *Queen Anne* was not to prevent the charges the crown was

was put to, but only the charges the officers were put to by groundless claims; and added, that when the party puts in his claim it is not known who will prosecute.

Mr. Attorney-General replied, that if there had been a verdict for the defendant, he would not only have had a right to bring an action for the recovery of the goods or the value, but that he would have had his costs by the act 6 Geo. 1. c. 21. s. 41. and therefore as the verdict was against him, he ought to pay costs.

I and Brother *Clive* only in court, ordered the deputy to tax the Attorney-General his costs occasioned by the claim; and that the recognizance should be put in suit against the security, as prayed.

E A S T E R T E R M,

22 Geo. 2. 1749.

Kemp and Grubb, who, &c. *against* Laskey, Wye and others, claiming the property of several fustians and other goods, seized by Kemp and Grubb.

The a^ct 14
Geo. 2. c.
17. for
judgment
as in case
of a non-
suit, does
not extend
to an infor-
mation for
the King and party.

AN order having been made at the fittings after last term, upon Mr. Starkie's motion, that the Attorney-General should shew cause why the like judgment should not be given in this information, as in case of a nonsuit in an action; and why the defendants should not

not have a writ of delivery for delay of prosecution, the former part of the order being grounded upon the act of the 14th of his present majesty, c. 17. and the latter part on the act of the 14 Car. 2. c. 11. s. 30. Cause was accordingly shewn. And on debate by counsel on both sides, I and brother *Clarke* only in court, discharged the order: For the inconvenience recited in 14th Geo. 2. is between party and party, and the issue is to be joined in any action or suit: And we thought an information for the King and party distinguishable from an action; for in such an information the subsequent proceedings are in the name of the Attorney-General, but, in an action, in the name of the plaintiffs, and it is considered as their action; and the distinction is taken in *Baker and Duncalfe*, 3 Lev. 398. and in *Kirkham and Wheeley*, 1 Salk. 30. and Comb. 319. And this case is the stronger, because it is an information of seizure *in rem*, for a branch of the revenue of the crown. And as to the writ of delivery; the delay was accounted for by affidavits, that two of the witnesses for *Kemp* and *Grubb* lived three hundred miles from *London*, were old and infirm, and could not come to *London* in the winter terms.

Hilary

H I L A R Y T E R M,

23 Geo. 2. 1749.

The King *against* James Donithorne, Esquire.

Where a
scire facias
is sued out,
and a scire
feci return-
ed, an ex-
tent may
issue after
the expira-
tion of a
rule to ap-
pear and
plead,
without
entering
any judg-
ment.

MR. Starkie having moved to set aside an extent as irregularly issued, there being no judgment entered upon the *scire facias*, the court referred the regularity of issuing the extent to the deputy-remembrancer; who by his report, dated the 10th of February 1749, certified, that he conceived that the practice of the court, in proceedings upon writs of *scire facias* whereon returns of *scire feci* have been made, is as follows; (*viz.*) on a *scire feci* returned, to give a rule on the said writ of four days at least, for the defendant to appear and plead thereto, or an extent to issue; and in case the defendant appears, then to give another rule on the said writ, of four days at least, for the defendant to plead, or an extent to issue; and in case the defendant doth not appear on the first rule, or appearing doth not plead on the second rule, process of extent hath issued, without any judgment previous thereto: But he found, that judgments had been sometimes entered up for the King, on the

the def endats default in not appearing, or in not pleading after appearance, on rules given on such writs for entering up the said judgments.

The court, on the last day of this term, agreed the practice to be as reported; confirmed the report; and ordered that Mr. Starkie take nothing by his motion.

E A S T E R T E R M,

23 Geo. 2. 1750.

The King *against* the estate of Edward Curtis,
deceased.

A Commission issued out of this court, directed to commissioners therein named, to find debts to the King. By an inquisition taken upon it, the 23d of February 1748, it is found that *Edward Curtis* died on the 10th of December 1748, and that he in his life-time and at the time of his death, was indebted to his majesty in the sum of 115*l. 1s. 4d.* for money may issue arisen due to his majesty for the land-tax, and duties on houses, windows and lights, within the counties of Brecon, Radnor and Montgomery, for the year 1747, by the said *Edward Curtis*.

Where a person is indebted by simple contract to the king at his death, and that debt is found upon a commission, a defendant, a debtor to the king by record at his death.

Curtis received to his majesty's use, from *Richard Lewis Esquire*, receiver-general of the said land-tax and duties; and in the further sum of 49*4l.* for money arisen due to his majesty for the land-tax, and duties on houses, windows and lights, within the said counties, for the year 1748, by him the said *Edward Curtis* received to his majesty's use from the said receiver-general.

On the 25th of February last, two writs of *diem clausit extremum* issued out of this court, directed to the sheriffs of the cities of *London* and *Bristol*, which severally recite the commission and inquisition, and command the sheriffs to enquire by the oaths of good and lawful men of their respective bailiwicks, what goods and chattels, and of what sorts and values, and what debts, credits, specialties and sums of money, the said *Edward Curtis*, or any other person or persons to his use, or in trust for him, had in their respective bailiwicks on the said 10th day of *December* 1748, being the day of his death; and to whose hands they came after his death, and in whose hands they then were; and what lands and teneiments, and of what yearly value, the said *Edward Curtis*, or any other person or persons for his use, or in trust for him, had in their respective bailiwicks on the day of his death; and who had received the rents, issues and profits of them from the time of his death; and who then received them: And the sheriffs are commanded to seize the goods and chattels, lands and teneiments, debts, credits, specialties and sums of money into the King's hands, according to the statute made for recovering the King's debts of this nature.

There

There is the usual clause to empower the sheriffs to summon and examine witnesses, and a *proviso* not to sell till further order; and there is this subscription to each *diem clausit extremum* —By the said commission and inquisition, and by an order of the court of exchequer and by the barons.

Several inquisitions have been taken by the sheriffs upon these writs of *diem clausit extremum*, and several goods, lands, tenements and debts, have been seized into his majesty's hands.

A motion was made to set aside these writs of *diem clausit extremum*; and, on an order to shew cause, several objections were debated at the bar.

I delivered my own, and the opinions of brothers *Clive* and *Legge*, (brother *Clarke* being dead,) upon the objections, and the answers which had been given to them.

But I would first remove out of the way several matters that are of less consequence, and seem to be given up by the counsel for Mr. *Curtis*'s administrator.

First. It was objected, that Mr. *Curtis* was not indebted to the King, as found by the inquisition taken upon the commission.

Answer. If Mr. *Curtis* was not debtor to the King as found by the inquisition, the administrator is not concluded, but may traverse, and plead that Mr. *Curtis* was not indebted to

H the

the King, as found by the inquisition. *Keilway* 93, 94. *Savile* 130.

Second objection. That it appears by the affidavits, that Mr. *Lewis* the receiver, by his letter, states this debt as due to himself from Mr. *Curtis*, and that Mr. *Curtis* had given notes for part of it.

Answer. Supposing this had been Mr. *Lewis*'s own money, Mr. *Lewis* might have brought an action for money received to his use, and Mr. *Curtis* could not have pleaded a note given for the same sum in satisfaction; because a note does not alter the nature of the debt, but it remains a simple-contract debt, as was held in *Cumber and Waine*, *Easter* 7 Geo. 1 B. R. now reported in 1 *Strange* 426.

But it being the King's money which Mr. *Curtis* received, it is extremely clear, that by the receipt of the money Mr. *Curtis* became debtor to the king; and that neither Mr. *Curtis*, by giving, nor Mr. *Lewis*, by accepting of a note to himself, can lessen his majesty's security or remedy.

It was further objected, That no *diem clausit extremum* can issue out of this court without a debt upon record, because it is an execution.

And I admit that the debt must be found upon record before a *diem clausit extremum* can issue: And so there was in this case; for by the inquisition taken upon the commission there was a debt upon record previous to the issuing of the *diem clausit extremum*.

But

But the material objection in this case is, that no *diem clausit extremum* ought to issue against the real or personal estate of any dead man, who was not a debtor to the King by record, at the time of his death.

By the common law the King has a prerogative of preference in payment to all his subjects, and to be first satisfied; the reason of it is given in Sir William Herbert's case, 3 Rep. 12. b. *Quia thesaurus regis est pacis vinculum et bellorum nervi.*

This preference which the King had by the common law, was the foundation of *magna charta*, c. 18. which was only declaratory of the common law.

And that this was the King's prerogative by the common law, and that process issued out of this court to enforce it, appears by *Madox's history of the exchequer*, from fo. 662 to 667.

The words of *magna charta*, c. 18. are—
Si aliquis tenens de nobis laicum feodum moriatur, et vicecomes vel ballivus noster ostendat literas nostras patentes de summonitione nostra de debito quod defunctus nobis debuit, liceat vicecomiti vel ballivo nostro attachiare et imbreviare omnia bona et catalla defuncti inventa in laico feodo, ad valentiam illius debiti, per visum legalium hominum: Ita tamen quod nichil inde amoveatur donec persolvatur nobis debitum quod clarum fuerit, et residuum relinquatur executoribus ad faciendum testamentum defuncti; et si nichil nobis debeatur ab

ipso, omnia catalla cedant defuncto, salvis uxori ejus et pueris ipsius, rationabilibus partibus suis.

And it is observable, that all that is required by these words is, that the party should die indebted to the King, but not that he should die indebted by record; but if he be indebted to the King by simple contract in his life-time, and that debt is found upon record after his death, it is sufficient; and then the goods which he had at his death are bound to the King's debt, and his officer may seize them; but when he owed nothing to the King at his death, the goods are to go to his executor or administrator, to be administered by him, and the King's officer cannot meddle with them. And in the case of *the King against the estate of Henry Boon, Easter 16 Geo. 2.* the court superseded a *diem clausit extremum*, because the party against whose estate it issued was not indebted to the King at the time of his death; and they have set aside a former extent in this case, for the very same reason.

But it is said, that the command of the writs of *diem clausit extremum*, that the sheriffs should seize all the goods, chattels and debts which Mr. *Curtis* had at the time of his death, shews that these writs ought to be grounded upon a debt due by record; because it is not necessary that debts due to the King, which are not of record, should be satisfied before debts due to other persons. And to this purpose was cited *office of executor 191, 192, 193, 194. 2 Roll. Abr. 159. letter H. pl. 8. Lane 65.* If a man hath a judgment upon a bond against A. who dies,

dies, and after another obligee of *A* assigns his bond to the King, the executor of *A*. may afterwards satisfy the judgment before the debt of the King, in as much as the debt now due to the King was not of record before the death of the testator.

But there are cases to the contrary, which shew the King has a preference in payment of debts not of record.

I lay no stress upon *Scroggs* against *Dame Grefham*, in 1 *And.* 129. because it is differently reported in *Moor* 193.

But in *Hilary* 31 & 32 *Car.* 2. *Roll* 86. *The King* against *Thomas Burnett*; there was an information against him, as administrator of *William Burnett*, for 100*l.* received by *William Burnett*, to the King's use. The defendant pleads, that *William Burnett*, in his life-time, was indebted to the defendant by bond in 1600*l.* And pleads, *plene administravit*; besides goods to the value of five pounds, which he retained towards satisfaction of his debt of 1600*l.* To which plea the Attorney-General demurred; and judgment was given for the King, that a debt by simple-contract due to the King was to be preferred before a debt by bond to a subject. And this judgment was affirmed upon a writ of error in the *Exchequer-Chamber*, and the affirmance of it is entered of the same term. *Roll.* 91.

The counsel for the administrator have enforced their objection from inconvenience; for bonds or specialties, may have been paid by the administrator,

administrator, or debtors to the estate of the deceased may have paid their debts to the administrator ; and it would be very inconvenient that the administration of the assets by the administrator, or that the payments made by the debtors of the deceased to the administrator, should be all set aside.

But the counsel for the crown insist, there can be no such inconvenience in the present case ; and have cited the case of *the King and White, Hilary 5 Geo. 2.* in this court, to prove, that as to all the King's debts not of record an executor or administrator may plead *plene administravit*, but not against debts on record. This case is in *Comyns's Rep.* 433 to 438.

But we give no opinion, Whether the King is or is not intitled to a preference in the payment of his simple-contract debts, before bonds or other specialties to the subject ; because that point may come in judgment before us upon the administrator's pleas to these very writs of *diem clausit extremum*.

And as to the inconvenience of overturning the administration of assets, We think this is arguing upon suppositions which do not occur in the present case ; because nothing has been seized upon these writs of *diem clausit extremum*, but what was unadministred : And all I shall say to it at present is, that any defence that will be a good one to a *scire facias*, will be also a good one to a *diem clausit extremum*. If the administrator has administred rightfully, he will be in no danger ; if wrongfully, it is just that he should be charged with a *devastavit*.

Objection.

Objection. That the sheriffs are by these writs of *diem clausit extremum* commanded to seize the lands which Mr. *Curtis* had at the time of his death; whereas the land of the King's debtor is not bound for a debt not of record from his death.

In answer to this objection, the counsel for the crown cited Sir *William Saint Lowe*'s case, *Plowd. Com.* 321. to shew, that the lands of the subject are not only liable from the death of the debtor, but from the time of contracting the debt; and there it is held, that if any person is accountant to the King, or if any money, goods, or chattels personal, come to the hands of any subject by matter of record or matter of fact, that the land of such subject is charged for it, and liable to the King's seizure, into whossoever hands it comes after, be it by descent or purchase.

Sir *Gerard Fleetwood*'s case, 8 *Rep.* 171. a. Resolved, that chattels are not bound to the King by judgment, but only by the award of execution; but that the freehold and inheritance of land are bound in the case of a common person, from the time of the judgment; and in the case of the crown, from the time any one becomes the King's debtor.

But we give no opinion, from what time the real estate of the deceased is bound for a debt to the King not of record; because this may also come judicially in question, upon pleas of the *tenants* to these writs of *diem clausit extremum*.

The

The last objection is, That these writs of *diem clausit extremum* appear to be founded on the statute of the 33 Hen. 8. c. 39. and yet there is nothing in that statute to warrant them.

The second and fifth sections of that statute are to give the King the same remedy for debts on bond as he had for debts on record; and I own that they are not applicable to the present case: But the seventh section is applicable to it; which provides, that suits for the King's debts shall be in the courts where they grow due. Now although the receipt of the King's money which caused the debt was in *Pais*, yet the inquisition taken upon the commission issued out of this court was sufficient to warrant these writs of *diem clausit extremum* for the recovery of the debt due from the deceased, as arising in this court.

Section 25. is also applicable to this case, which preserves the King's preference before common persons.

The case of *the King and Manley*, 12th February 1742, is this very case, and an authority in point.

We therefore are of opinion, that these writs of *diem clausit extremum* are well warranted; and that the order to shew cause why they should not be set aside ought to be discharged. And we accordingly discharged it.

Michaelmas

MICHAELMAS TERM,

24 Geo. 2. 1750.

Charles Malden, who, &c. *against* John Bartlett.

THE plaintiff exhibited an information in this court, setting forth that he seized to the use of his majesty and himself, as forfeited, a parcel of tobacco stalks or stems, stript from the leaf; for that they were imported from parts beyond the sea into Great Britain, contrary to the statute in that case made and provided, whereby they became forfeited. And the prayer of the information is, that they may remain forfeited. The usual proclamation is made, for any one to come in and shew cause why the goods should not remain forfeited; and a writ of appraisement is issued and returned; and the second proclamation is made. John Bartlett comes in and claims property; and pleads, that the tobacco stalks were not imported contrary to the statute. The Attorney-General joins issue, and there is a verdict for the King.

Where the informer suing for the King and himself is intituled to no part of the forfeiture, the whole shall be adjudged to the King.

Mr. Starkie and Mr. Perrott moved in arrest of judgment, and took several exceptions to the

the information; and Mr. Solicitor-General, Sir *Thomas Bootle*, and others, were heard in answer to them: And, after some time taken to consider of the exceptions, I delivered the opinion of the court for the King.

This information is grounded on the act 12 Geo. 1. c. 28. s. 13. And be it declared and enacted by the authority aforesaid, that all tobacco stalks or stems stript from the leaf shall be prohibited to be imported; and on seizure and condemnation thereof, the commissioners of his Majesty's customs shall and may cause the same to be publickly burnt, and shall and may allow the officer, for his encouragement in making the seizure, one penny for every pound weight of such stalks or stems so seized and condemned, clear of all charges of condemnation.

It was objected by the defendant's counsel, that the seizure is alledged in the information to be to the use of the King and the plaintiff: Whereas the tobacco stalks, upon condemnation, are to be burnt; and the officer can have no part or benefit from the thing seized; and the penny in the pound he is intitled to is collateral.

And to enforce this objection, they insisted on the statute of the 9th of Geo. 2. c. 35. s. 34. And whereas by the present practice of the court of exchequer, and elsewhere, it is become necessary for all officers of the customs and excise, and other officers of the revenue, upon the trial of any information of seizure, to give proof of the exact method and manner of

MICHAELMAS TERM, 24 Geo. 2. 1750.

of making the feizure, with an account of the form of words used on that occasion, (notwithstanding the defendant in such cause does on the claiming of such goods acknowledge that a feizure of them hath been made,) whereby there often happens a failure of justice, and his majesty, and the officer making the feizure and prosecuting the same, are frequently defeated of their right, without entering into the merits of the cause: For remedy thereof, be it further enacted by the authority aforesaid, that on all trials of feizures whatsoever, in the court of exchequer or elsewhere, the feizure, together with the method and form of making it, shall be taken to have been made by the person or persons who shall inform and sue for the same, and to be done in the manner as set forth in the information, without any evidence thereof; and all judges and justices of the peace before whom any such feizure shall be brought to trial or hearing, are hereby required to proceed to the trial of the merits of the cause, without inquiring into the fact, form or manner of making the feizure.

It seems to me, that this act has only dispensed with the proof of the feizure, and manner and form of making it, but that a proper feizure ought still to be alledged; for the words are, that the feizure shall be taken to have been done in the manner as set forth in the information, without any evidence thereof; and judges are to proceed to the trial of the merits, without inquiring into the fact, form or manner of making the feizure.

By

By the statute 13 & 14 Ch. 2. c. 11. s. 16. Seizures of prohibited or uncustomed goods are confined to the officers of the customs.

By 12 Geo. 1. c. 28. s. 28. No information is to be filed for the recovery of any penalty by the laws of the customs, but by the Attorney-General or an officer of the customs.

And the very clause on which this information is grounded supposes a seizure legal; for it speaks of a seizure and condemnation; and for the encouragement of the officer making the seizure, gives him a penny in the pound.

But it is said—Admitting the plaintiff could seize these tobacco stalks, yet he could not seize them to the use of his majesty and himself, because they are to be burnt. And I must confess, that in strict propriety this does not seem to be altogether right: For though this, being a seizure *pro bono publico*, and to prevent a public detriment, may be said to be a seizure for the King, as supreme head of the kingdom, and as having the executive power of the laws in him, yet I do not well understand how it can be a seizure to the plaintiff's own use; and should have thought it better, if it had been laid generally that he seized these tobacco stalks, or that he seized them to his majesty's use.

But I apprehend this allegation to be only surplusage; and it is a general rule, that surplusage will not hurt in legal proceedings.

In *Wrottesley and Adams, Plowd.* 199. it was objected by *Anthony Brown*, that the writ was not good; because the words of it were, that the prior and convent demised to the plaintiff; whereas the convent are dead persons in law, and cannot demise any thing, but it is only the demise of the prior: But Lord *Dyer* held the contrary; for since it is apparent in law that the convent cannot demise, it is to be adjudged nothing but surplusage, which shall not abate the writ.

So here, since it is apparent that the officer could not seize to his own use, it is only surplusage; and will not vitiate this information. *Sav.* 6.

But the objection which was most relied upon is, that this information is not maintainable; because the plaintiff can recover no part of the forfeiture, as the tobacco stalks upon condemnation are to be burnt.

And the defendant's counsel, in support of it, cited *Cuff and Vachel*, 1 *And.* 138. Action on the 23d of Queen *Elizabeth*, for not coming to church; whereby a forfeiture of twenty pounds a month is incurred to the Queen: And then the act distributes the forfeiture between the informer, the Queen, and poor of the parish. And it was objected, that the whole forfeiture was given to the Queen, and that therefore the informer could not sue; because it is absurd that any one should sue for what belongs to another. But the court held, that the distribution was not void; but that the informer was intitled to a third of the forfeiture; and that therefore the action was well brought.

And

And indeed this case, according to the observation made at the bar, does seem to imply, that an informer cannot maintain an information, where he is not intitled to the forfeiture, or any part of it.

It must be admitted, that the plaintiff can have no part of the tobacco stalks, nor can he have judgment on this information for the penny in the pound given by the act; for the judgment is only, that the tobacco stalks do remain forfeited, and that they be burnt according to the act.

But I think that this consequential benefit of a penny in the pound, will intitle the plaintiff to prosecute to condemnation; for otherwise there will be (as my brother *Smythe* observed upon the motion) a right without a remedy.

But supposing the act had given the officer no benefit, the information would have been good, according to the authorities I shall mention, which are contrary to the case of *Cuff* and *Vachel*.

Roe against Roe, Hard. 185. In an information at the suit of *Croft*, as well for the King as himself, for selling and importing to be sold foreign woollen; (and I suppose there was a verdict for the plaintiff, though that is not stated:) But the book goes on, that afterwards judgment was given for the King only, because no act of parliament gives the informer a share.

Oldfield,

Oldfield, who, &c. against *Blaydwin*, entered *Mich. 7. Anne, Roll. 51.* Information upon the statute 1 *W. & M. c. 32.* continued by 4 & 5 *W. c. 24.* for carrying 386 fleeces of wool, containing 66 tod's and 14 pounds weight, within five miles of the sea coast, in order to exportation, without due entry made of it; and the plaintiff demands a moiety. After a verdict for the plaintiff, the defendant, in *Easter term, 8th of Anne, 1709,* moved in arrest of judgment; and the exception taken to the information was, that the whole forfeiture was given to the Queen, and yet the plaintiff demands a moiety of it: And on great debate by eminent counsel on both sides, judgment was given in *Trinity term following*, for the Queen, for the whole forfeiture.

This information is agreeable to all the precedents for importing tobacco stalks contrary to the act 12 *Geo. 1. c. 28.*

Judgment was accordingly given for the King, in the present case.

TRINITY TERM,

24 & 25 Geo. 2. 1751. (but entered Michaelmas 21st of said King, Roll 7.)

The King *against* John Cotton, Esquire.

An immediate exten-
tent against
the King's
debtor,
tested after
a distres
for rent
justly due
to the
landlord,
with notice
to the te-
nant being
the King's
debtor, and
apprai-
ment of the
goods and
chattels,
but before
sale, shall
prevail
against the
distress.

THIS case stands for the judgment of the court: And as it is a case of great consequence both to the crown and the subject, so it has been very ingeniously and learnedly argued by the counsel on both sides; and the court have endeavoured to give it that mature consideration which so important a case deserved.

The case upon the record is this—An extent issued out of this court, tested the 14th day of October in the 21st year of his majesty's reign, directed to the sheriff of the county of Huntingdon, against Philip Chapman, Esquire; upon a bond entered into by him and others to his majesty, bearing date the 24th of March in the 8th year of his majesty's reign, whereby they became jointly and severally bound to his majesty in 1500*l.* payable at a day then past.

And

And upon another bond, entered into by *Philip Chapman* and others, bearing date the 9th day of *August*, in the 20th year of his majesty's reign; whereby they became jointly and severally bound to his majesty in 8000*l.* payable at a day then past.

And then the writ suggests, that neither of these sums had been paid.

The sheriff is therefore commanded, not to omit for any liberty in his bailiwick, but to take the body of the said *Philip Chapman*, and to keep him in prison till he shall have fully satisfied the said debts.

And the sheriff is also, on the oath of good and lawful men of his bailiwick, and by legal testimony of witnesses, and by all other ways, means and methods, whereby the truth may be the better known, to inquire what lands and tenements, and of what yearly value, the said *Philip Chapman* had in his bailiwick, on the said 24th of *March*, in the 8th year of his majesty's reign, when he first became indebted, or at any time after.

And what goods and chattels, of what kind and value, and what debts, credits, specialties and sums of money, the said *Philip Chapman*, or any other person or persons in trust for him, (the words of the writ are) now hath: That is, on the day the writ is tested.

And the sheriff is to cause all and singular the said goods and chattels, lands and tenements,
I debts,

TRINITY TERM, 24 & 25 Geo. 2. 1751.

debts, credits, specialties and sums of money, in whose hands soever they then remained, by the oath of good and lawful men to be appraifed and extended; and to take and seize them into his majesty's hands, that he may have them until he shall be fully satisfied his said debts, according to the statute in that case made.

And there is power given to the sheriff to call witnesses before him, and to examine them touching the premies.

And the usual proviso, not to sell without leave of the court.

The sheriff has returned an inquisition, taken before him the 10th day of *November* in the 21st year of his majesty's reign, finding several lands and goods not material to be stated in this case; but as to the goods claimed by Mr. *Cotton*, the present defendant, it is found, that the said *Philip Chapman*, on the said 14th day of *October*, (being the teste of the extent,) and on the day of taking the inquisition, was possessed, as of his own goods and chattels, of and in the several goods and chattels of the several natures, kinds and values, mentioned and specified in a schedule or inventory thereof to the said inquisition annexed, marked letter (B), amounting in value to the sum of 319*l.* 7*s.*

But the jury further find, that there was due and owing to *John Cotton*, Esquire, at *Michaelmas* then last, from the said *Philip Chapman*, the sum of 257*l.* 6*s.* 6*d.* for rent of the premisses whereon the said goods and chattels were

so seized; and that on the 12th day of *October* then last past, a distress was made of all the goods and chattels mentioned in the said schedule marked letter (B), for the said rent; except the hay-cock therein mentioned to be in *Brickhill-Close*, of the value of 10*l.*

The jury find the notice of the distress in *bae verba*; and that the schedule or inventory marked (B) contains an account of the goods and chattels which were distrained for Mr. *Cotton's* rent.

The defendant Mr. *Cotton* was advised, or did not think it proper, to rely upon the facts found in his favour by the inquisition; but has claimed property in this court, of all the goods and chattels in the schedule or inventory marked (B), except the haycock in *Brickhill-Close*; and as to what he has so claimed, he has pleaded specially, that before the said 14th of *October*, on which day the said writ of extent issued, (to wit) on the first of *March* 1743, he was, and continually since that time hath been, seized in fee of a messuage, barn, stable, garden, and several lands, (naming the particular closes,) with the appurtenances, situate and being at *Connington*, in the county of *Huntingdon*; and being the tenement and farm in the inquisition mentioned, whereon the goods and chattels mentioned in the schedule marked (B) were seized.

And the said *John Cotton*, being so seized of the said messuage or tenement, with the appurtenances, afterwards, and long before the said 14th of *October*, when the said writ of extent issued,

issued, (to wit,) on the said first day of *March* 1743, at *Connington* aforesaid, demised the said messuage and tenement, with the appurtenances, to the said *Philip Chapman*; To hold from *Lady-day* then next for one whole year; and so from year to year, as long as it should please both parties; yielding and paying, yearly and every year during which the said *Philip Chapman* should hold the said messuage and tenement by virtue of the said demise, the rent or sum of 17*l. 11s.* to be paid half-yearly, at *Michaelmas* and *Lady-day*, by equal portions.

By virtue of which demise, the said *Philip Chapman* afterwards, (to wit) on the 26th of *March* 1744, entered into the premisses, and was possessed thereof; and held and enjoyed the same by virtue of the said demise, continually from thence, until, at and upon the said 14th of *October*, when the said writ of extent issued.

And the defendant Mr. *Cotton* further says, that 25*l. 6s. 6d.* of the said rent, for one year and an half, ending at *Michaelmas* in the 21st year of his majesty's reign, at that feast, and on the 12th of *October* in that year, were in arrear and unpaid to him; wherefore he, before the day of issuing the said writ of extent, (to wit) on the 12th of *October* in the same year, entered into the premisses, to distrain for the rent aforesaid so in arrear, and seized and took all the goods and chattels mentioned in the schedule marked (B), except as aforesaid, being found on the said premisses, as a distress for the said arrear of rent, and impounded the same upon the premisses, in such parts

parts thereof as were most convenient ; and immediately after taking the distress, (to wit,) on the 12th day of *October* aforesaid, gave notice to the said *Philip Chapman* of the said distress, and of the cause of taking it.

Mr. *Cotton* further says, that the goods and chattels so distrained, or any of them, were not replevied within five days after the distress and notice aforesaid ; and that after the expiration of the five days, he, together with *Thomas Dix* then being constable of the parish of *Connington*, in which the distress was taken, caused the said goods and chattels to be appraised by *William Blott* and *John Bond*, being sworn by the said constable to appraise the same truly, according to the best of their understanding ; and the said two appraisers appraised the same at 280*l.* 14*s.* 6*d.* And the said defendant would have sold the said goods and chattels so distrained for the best price that could be got for the same, in order to the satisfaction of the said arrear of rent ; and after satisfaction of the said arrear of rent, and of the charges of the distress, appraisement and sale, would have left the overplus in the hands of the constable, for the use of the said *Philip Chapman* :

But the defendant Mr. *Cotton* says, that after the said distress, notice and appraisement, and before the said goods and chattels, or any of them, were or could be conveniently sold, and whilst the same continued so impounded, the sheriff of the county of *Huntingdon* did seize the same into the King's hands, by colour of the said writ of extent.

Traverses

Traverses—That the said *Philip Chapman*, on the said 14th of October, in the 21st year of his majesty's reign, or at any time afterwards, was possessed, as of his own proper goods and chattels, of and in the goods and chattels mentioned in the said schedule or inventory marked letter (B, to the said inquisition annexed, or of any part thereof, (except the haycock in the *Brickhill-Close*,) in manner and form as is found by the inquisition: And concludes in common form, with praying, that the King's hands may be removed; and that the sheriff may be discharged from accounting for these goods; and that the defendant may be dismissed from this court.

Mr. Attorney-General has demurred generally to this plea; and the defendant has joined in demurrer.

Before I particularly enter upon the consideration of this case, I would premise two things, which are agreed by the counsel on both sides.

First. That if the goods distrained had been actually sold before the day on which the extent bears teste, that there would have been no colour for a seizure of them; for this plain reason—That the extent authorizes the sheriff to seize Mr. Chapman's goods; and after sale the property would have been altered out of him, and vested in a stranger.

Secondly. And for the same reason, it is agreed, that if this had been the case of goods pawned

pawned or pledged by Mr. *Chapman* to Mr. *Cotton*, before the teste of the extent, they could not have been legally seized ; because the property would have been immediately altered by the act of Mr. *Chapman*, and Mr. *Cotton* would have gained a special, though not an absolute property in them. *Fitz. Barr.* 121. *Plowd* 437. prove no more as to pledges than what is admitted.

I shall now apply myself to this particular case.

And the general question is—Whether goods are not liable to be seized on an immediate extent for the King's own debt, after a distress taken of the same goods by a landlord, for rent justly due to him, and before an actual sale of the goods ?

And in order to determine this question, I shall consider the nature and effects of a distress.

A distress (so far as it is applicable to the present case) is where one takes the cattle or other things of another, in some ground or place, for rent in arrear ; which cattle, or other things so taken, are to be kept in a pound until the distrainer be satisfied his rent, or the cattle or other things be released by due course of law, or in other words, are replevied, in order to enforce payment of the rent.

This being the nature of a distress, I will inquire into its effects.

First—Affirmatively.

Goods

Goods so distrained are not liable to the distress of another subject, because they were in the custody of the law. *Bro. Distress*, pl. 75.

Nor are they liable to another subject's execution, for the same reason. *Bro. Pledges*, pl. 28. *Finch's Law* 11.

'Nay, further, according to the case I am going to cite, where the King claims by forfeiture upon an attainder or outlawry, the subject shall have the benefit of his distress against the crown, and the King cannot have it without redemption.

Bro. Pledges, pl. 31. A man distrains his termor for rent arrear, and after the termor is attainted for felony done before the distress taken. And the opinion of the court was, that the King should not have the distress as forfeited, without satisfying the party who distrained; for this was lawfully taken at the time of the distress: Otherwise, where the donor distrains the tenant in tail for rent, and after the tenant in tail is attainted for felony done before the distress: for there the donor may constrain the heir of the tenant in tail, after the execution of his father; yet in the first case he hath no other remedy.

Justice *Harper*, in *Nicholls and Nicholls, Plowd.* 487. cites this case a little differently: That the Earl of Kent had a return of certain cattle in replevin, and the owner of them is attainted; the earl shall keep them against the King, till he is satisfied for the Thing.

And

And it is also cited by Mr. Justice *Dodderidge*, as law. 3 *Bulstr.* 17.

The distrainer may maintain a writ of *replevin*, if the cattle or other things are rescued before they are put into the pound; and a *parco fracto*, if they are unlawfully taken out of the pound after impounding; but these writs are for the injury done to the distrainer, and are not founded upon his property, as appears by the form of the writs in *Fitz. Nat. Brev.* 4 to *Edit.* 228, 230.

The distrainer's executor shall have the benefit of his testator's distress, 15 E. 4. 10. but he cannot be in a better condition than his testator was.

Secondly—Negatively.

The distrainer neither gains a general nor a special property, nor even the possession, in the cattle or things distrained: He cannot maintain trover or trespass; for they are in the custody of the law by the act of the distrainer, and not by the act of the party distrained upon.

Mich. 20 H. 7. fo. 1 pl. 1. There it is expressly said, by *Frowicke*, Chief Justice of the Common Pleas, and not denied, that the distrainer hath neither property nor possession in the distress, for the pound is an indifferent place between them, and the party distrained is only restrained from the use of the distress till payment of the rent: and if a stranger takes the goods

goods distrained out of the pound, the Lord shall only have a *parco fracto*; and in the same case the tenant shall have an action of trespass, for the property remains in him: And it is not like a pledge, for he has a property for the time; and so of bailment of the goods to be redelivered, the bailee shall have trespass against a stranger, because he is chargeable over.
Abridged Bro. property 52.

Mores and Conham, Mich. 7 Jac. C. B. Owen 123. It was agreed by the court, that if a man takes a distress, he cannot work the distress, for it is only the act of law that gives power to the distrainer; for he hath no property in the distress, nor possession *in jure*. And it was agreed by Lord Coke and Mr. Justice Warburton, that when a man hath a special interest in a thing by act in law, he cannot work it, or otherwise use it; but contrary upon a special interest by the act of the party, as in case of a pawn.

The distrainer cannot tan a hide, because the marks for knowing it are taken away. *Duncomb versus Reve and Green, Cro. Eliz. 783.*

Bagshaw and Gawan, 1 Ro. Abr. 673. letter P. pl. 8. Noy 119. held he cannot milk a cow.

And yet *Cro. Jac. 147, 148.* reports this part of the same case otherwise; that of necessity a cow may be milked, to prevent her being spoiled: And 12 Co. 101. countenances this opinion. But this point not being now directly

directly in judgment, we leave it undetermined.

Goods distrained are in the custody of the law, *Co. Lit.* 47. b. As the distrainer could not use or work the distress, much less could he sell it, at common law.

And yet, in *Madox's History of the Exchequer* 670. it is said, that when sheriffs had levied or distrained for the King's debts, it was their duty to sell or dispose of such distress at a just and reasonable price, so that the owner was not aggrieved thereby.

This brings me to consider the nature and effects of an immediate extent for the King.

The nature of an extent I have already stated from the writ in this cause, the words of which, (so far as relates to the present case,) are to seize into the King's hands the goods and chattels which the King's debtor now hath ; that is, on the day of the teste of the extent.

And the effect is, that an extent binds the property of the goods of the King's debtor from the teste of it.

41 *E. 3. Fitz. Execution* 38. Execution upon a statute-merchant was sued in *C. B.* A writ out of chancery, rehearsing that the conuzor was the King's debtor in the exchequer, was shewn, and therefore execution ceased till the King's debt was levied : But it was prayed that

that process might be continued upon the roll in the meantime; but no *capias* was awarded against the body.

3 E. 6. Dyer 67. b. *Stringfellow's case.* He sued a writ of extent against *Brownfopp*, directed to the sheriff of *Berkshire*, whereby lands were extended and goods seized, but no *liberate*. A writ of prerogative issued out of the court of exchequer, reciting the King's prerogative to be first served; and commanding the sheriff to levy the King's debt of the goods, if sufficient, if not, then upon the lands; which writ was delivered to the sheriff after the day of the return of the first writ, (although the first writ was not returned at the day) and the sheriff returned the special matter, that there were no goods or lands beyond what he had extended. But he was amerced: For he ought to have returned the extent, for the service of the King's debt; because the property of the goods and lands was not in *Stringfellow*, till they were delivered to him by a writ of *liberate*. But the book goes on—*Ideo quere, quia contra opinionem multorum in templo*; because they were seized into the King's hands to be delivered to the party, and so they are in the custody and consideration of the law, and privileged from all other executions.

And Mr. *Callis*, in his reading on the statute of 23 Hen. 8. of *Sewers*, 195, 196. thinks it to be the better opinion, that these goods and lands were not liable to seizure for the crown.

But

But notwithstanding the opinions of the gentlemen of the temple, and of Mr. *Calis*; I shall shew *Stringfellow's* case to be undoubtedly law.

Lord *Hobart*, in *Sheffield* and *Ratcliffe*, fo. 339. cites it as law; and says, that the sheriff was enforced, notwithstanding the custody of law, to serve the King.

And Lord Chief Justice *Rolle*, in the second volume of his abridgement, 158. letter. G. pl. 2. has abridged this case, and says the sheriff ought to execute the extent for the King's debt, because the property of the goods and land was not in *Stringfellow*, before they were delivered to him by a writ of *liberate*, and therefore liable to the King's patent.

The Queen and *Tannar Arnold*, Mich. 8 *Anne*, in *Scaccario*. It was taken for granted by the court, that an extent for the Queen's debt binds the property of the debtor's goods from the teste.

And Lord Chancellor *Hardwicke*, when Chief Justice, in delivering the resolution of the Court of King's Bench, in *Braffey* and *Dawson*, Mich. 6th of his present majesty, cited and relied upon *Stringfellow's* case, as clear law; and said it was grounded on the general rule of preference allowed by law to the King's debts.

And though a sheriff may maintain trover or trespass, for goods taken in execution by him, against a wrong-doer, because he is answerable over

altered, is the true reason ; which will appear, by supposing, that the extent in that case had issued the day after the date of the assignment ; for then it would have been a clear case against the crown, because the property of the goods would have been absolutely transferred, out of the bankrupt, and vested in the assignees. The consequence of which would have been, that then they would have become the goods of other men ; and when an extent came afterwards, it would have been to seize the goods of other persons : But the King cannot take the goods of strangers for his debt. This is the true distinction : Nothing bars the King but the assignment ; and that bars him, because it has altered the property of the goods.

Objection. But the defendant's counsel insist upon another distinction between *Stringfellow's* case and the present case : That in that case the execution was only in *fieri*, and executory till a *liberate* ; but a distress was compleat at common law, for the distrainer had then no power to sell.

Answer. To which I answer, that the distress was not compleat, because it was no satisfaction ; but supposing, for argument's sake, that it was, yet, goods are liable to seizure on an extent till there is an alteration of property ; and a distress is no alteration of property.

They then enforce this objection by two reasons.

**First rea-
son.** First, That this would be very hard and inconvenient ; because a man might have had a distress

distress for ten or twenty years, and yet lose the benefit of it by an extent.

But length of time will not mend the distrainer's condition ; according to the maxim,
Quod ab initio non valet tractu temporis non convalescit.

Secondly, That levy by distress is a good ^{Second reason.} bar ; and it would be very strange that the landlord should be deprived of the benefit of it, and not be at liberty to distrain *de novo*. *Vasper and Eddowes, Mich. 12 W. 3. B. R.* reported in *1 Salk. 248.* was cited to prove this.

To which I answer, That it is agreed in that ^{Answer.} case, that if the distress dies in the pound, or escapes without the default of the distrainer, his remedy revives, and he may distrain *de novo*. *Dyer 280. a. b. Hob. 61.* And by the same reason he may distrain *de novo* when the distress is legally evicted without his default ; for levy by distress is only a temporary bar, but no satisfaction.

It was then objected, that by a distress the ^{objection.} distrainer gains a right to detain the goods distrained till payment of the rent ; and this was resembled to the case of an innkeeper, who may detain a horse for his keeping, tho' (as it was said) he has no property : and that the property in this case is immaterial.

As to the case of an innkeeper, no authori- ^{Answer.} ty was produced, to shew whether he did gain a property or not ; and whoever will give them-

K. selves

selves the trouble to compare the case of *Roffe* and *Bramsteed*, 2 *Rolle's Rep.* 438. with the case of the *Hostler, Yelv.* 66. will find, that very learned judges have differed in opinion upon this point: But take it either way, if no property is gained by the innkeeper, it is arguing in a circle, and in effect begging the question; if a property is gained, then it is not applicable to the present case, because it is agreed on all hands, that the horse would not be liable to seizure on an extent. And we deliver no opinion upon the case of an Innkeeper, because it is not now judicially before us.

Objection. But I must confess, That the latter part of the objection, (that the property is immaterial in this case,) greatly surprized me, because the gentleman who insisted upon this, seems to have forgot his client's plea; (but he was very excusable, considering the avocations he then had, and the continual hurry he was in;) for the plea has expressly traversed Mr. *Chapman's* property in the goods in question, at the time of issuing the extent: And if the property is immaterial, then here is an immaterial traverse, and the plea is bad on that account; for a traverse in pleading ought ever to be material, and issuable. But the traverse is very proper; because it traverses the title of the crown found by the inquisition.

For in the case of *the King and Mann, Hilary 1726*, in this court, it was expressly laid down by Lord Chief Baron *Pengelly*, that whoever pleads to the title of the crown, found by an inquisition, is obliged to traverse that title so found; and not to put the crown to traverse the

the title set up by the defendant, or to force the crown to take a traverse ; though the crown has an election to traverse the inducement or title set out by the defendant. And *Palmer* 81. *Keilway* 175 a. *Vaugh.* 62. and 2 *Jo.* 9, 10. are to the same purpose.

But the fault in this plea is, that the inducement to the traverse is wholly insufficient ; for pleading a distress for rent, shews no alteration of the property of the goods distrained, but they, notwithstanding the distress, continue liable to seizure on an extent.

And according to the rules of pleading, even between subject and subject, there ought to be a proper inducement to every traverse, to shew the matter contained in the traverse to be material ; for though the inducement to the traverse is not traversable generally, yet it ought to be such as if true will defeat the title of the other party, otherwise the traverse amounts to a negative pregnant. And this is fully laid down in *Bro. Pleadings*, pl. 35. *Witbam and Barker*, Mich. 6 *Jac.* 1. *B. R. Telv.* 147. *Johnson and Sir Henry Rowe*, *Trin. 3 Car.* 1. *B. R. Cro. Car.* 265. *Dike and Ricks*, Mich. 9 *Car.* 1. *Cro. Car.* 335. *Newland and Collins*, Mich. 5 *Geo.* 1. *C. B. Lord Chief Baron Comyns's Reports* 302.

And improper inducements are ridiculed in *Telverton*; as if you might as well induce a traverse, by saying “ *Robin Hood in Barnwell* ” stood.

And this is still stronger in the case of the crown : For whoever pleads off the King’s hands

hands ought to shew a title prior to that found by the inquisition ; and the King (as I have shewn already) is not confined to take issue upon the traverse offered by the defendant, but has an election, to traverse the inducement or title set out by him.

But there is something very particular in this plea, that must be taken notice of : The defendant has pleaded the distress and notice to be on the 12th of *October* ; that the goods not being replevied, he after the expiration of five days caused them to be appraised ; and that he would have sold them, if he had not been prevented by the seizure upon the extent.

But the extent issued on the 14th of *October*, and the property of the goods was bound that day ; and pleading a subsequent appraisalment, and an intent to sell, is pleading an act and an intent contrary to law, and therefore vain and nugatory ; and a subsequent appraisalment is so far from avoiding the title of the crown, that an appraisalment prior to the issuing of the extent would not have been sufficient to have done it : For it appears by *Tremaine's pleas of the crown* 640. that in the case of *the King against Crump and Hanbury*, already cited, a prior appraisalment was pleaded ; and yet the plea was held ill, and judgment given for the King. Nor can the intent to sell avail the defendant, as is held in *Dalison's Rep.* 71. *Webb and Paternoster, Palmer* 71. 2 *Rolle's Rep.* 152. and *Kidder and West, 3 Lev.* 167.

But besides, an appraisalment is only a preparatory step towards a sale ; and an intent to sell, is

is no sale ; and the property of the goods distrained could only be altered by an actual sale.

The defendant's counsel then rely on the case of the 13 Ric. 2. Bro. *Pledges* 31. and cited in *Plowden* and 3 *Bulstr.* That where the King claims by forfeiture upon an attainder, the subject shall have the benefit of his distres, against the crown ; and that the King cannot have it without payment of the rent : And that the same rule ought to hold in the present case.

Mr. Attorney and Solicitor-General, on the other hand insist, that there is a difference between the case relied upon, and the present case ; because where the King claims by forfeiture, he claims under the forfeiting person, and can have no better right to the goods distrained than he had, though in some respects he may have a better remedy. But, in the present case, both the King and Mr. *Cotton* are creditors of Mr. *Chapman*, and are both pursuing their legal remedies for their debts : And the contest in this suit is for preference of satisfaction ; and that the King is intitled to that preference by prerogative.

The defendant's counsel controvert this proposition ; That in case of a forfeiture, the crown claims under the forfeiting person : And insist, that in that case, as well as the present, he claims by prerogative.

And they cited several cases, which I will consider. *Plowd. Com.* 262. *Dame Hale's case.* Husband and wife, jointenants of a term for years ; the husband is *felo de se*, he shall forfeit the

the whole ; and yet there it survives till office : but after office, it shall have relation to the time of the death. The reason of this is, because the title of the crown and of the wife concurring in the same instant, the title of the crown shall be preferred.

9 Co. 129. *Quick's case*, immaterial : For there the crown did not claim by forfeiture, either under an attainder or outlawry.

The next is *Knight's case*, 5 Co. 56. a. b. And in many cases the King, who claims by a subject, shall be in a better case, in respect of the dignity and prerogative incident by the law to the royal person of the King, than the subject himself by whom he claims.

This shews, that the King claims by the subject ; which was one of the things contended for by Mr. Attorney and Solicitor.

I now proceed to Lord *Coke's* instances.

As, if the King has a rent-seck by attainder of treason, or by grant, he shall distrain for it not only in the land charged, but in all his other lands ; and yet the subject, by whom he claims, shall not distrain for it.

This instance does not alter the nature of the rent ; but only shews that the King shall have a better remedy than the forfeiting person would have had if he had not forfeited.

The

The next instance is, If a subject has a recognizance or a bond, and afterwards is outlawed or attainted, the King shall seize all the lands of the conuisor or obligor, whereas he himself could have but a moiety. The same is in *Cro. Jac. 513. Hardr. 24.*

But this is still but a further advantage in point of remedy.

So in the case then at bar, the King shall take advantage of the condition, without demand; yet the prior himself, under whom the King claimed, could not re-enter in default of payment of the rent, without a demand made.

This is still but a further advantage in point of remedy; and, besides, the King did not claim there by forfeiture, but surrender.

The last instance is, If the King purchase a feigniory, of which land was held by posteriory, the King shall be in a better condition than the subject from whom he claims, and shall have the priority.

In this instance the King claimed by purchase, and not by forfeiture; and so not applicable to the present case.

The next case is in *1 Lord Hale's pleas of the crown 254.* If tenant in tail of the gift of the King, the reversion in the King, make a lease for years, and then is attainted of treason, the King

King shall avoid that lease ; for the King is in of his reversion, though the tenant in tail have issue living. This hard case is so adjudged in the commentaries. *Austin's case, in fine.*

Lord *Hale* gives the reason of this case, That the King was in of his reversion ; but if you will look into *Plowden* 560. you will find that the law would have been quite otherwise, if the King had claimed by forfeiture ; for then he must have had the land charged with the lease : So that this case is far from being an authority in favour of the defendant.

The last case is, *the King and Baden, Show. Parl. Cases* 72. *Baden* had a judgment against *Clarke* ; and after his judgment, *Clarke* is outlawed at the suit of *Allen* ; and upon the outlawry an inquisition is taken, and the lands seized into the King's hands ; and then *Baden* takes out an *elegit*, and has a moiety delivered to him ; and then comes into this court, and pleads as tertenant, to remove the King's hands. But judgment was given for the King, and affirmed in the Exchequer-Chamber ; and afterwards in the House of Lords, 20th February 1694 ; upon this particular reason, not applicable to the present case : That he who pleads off the King's hands ought to have a legal title prior to the estate found by the inquisition ; and it was his own laches and default that he did not perfect his title, by suing out an *elegit* and extending the lands, before the taking of the inquisition upon the outlawry ; for then he would have had a good title against the crown.

I now

I now proceed to deliver the sense of the court upon this point. We think that there is a difference between cases where the King claims by forfeiture, upon an attainder or outlawry, and where he sues for the recovery of a debt; because a man can only forfeit what he has, though the King may in respect of the forfeiture be intitled to advantages in point of remedy, which the forfeiting person would not have been intitled to in case he had not forfeited: And that an estate which is not forfeited even for treason, may yet be liable to the satisfaction of the King's debt.

I shall support this difference by authorities.

That a man can only forfeit what he has, is laid down in *Plowd.* 487.

Cranmer's case, 1 And. 19. Mo 100. *Cranmer*, Archbishop of Canterbury, made a feoffment of lands to the use of himself for life, and after his decease, to the use of his executors and assigns for twenty years, and after to the use of *Thomas Cranmer* in tail: The archbishop was attainted of treason. And if this was an interest in the archbishop, or not, was the question. And it was held it was not, and that therefore he could not forfeit it.

And yet what is not forfeited even for treason, may be liable to the King's extent.

Sir

Sir William Smith and Wheeler, Easter 23 Car. 2. B. R. 1 Ventr. 128. 2 Keb. 772. The question was, Whether a lease which *Simon Maine* had power over, who was attainted of treason as one of the regicides, was forfeited or not? And held it was not; because the power was inseparably annexed to his person, and because the power was not found to be executed.

But Mr. Justice *Ventriss*, fo. 132. reports, that Lord *Hale* said, As to execution for the King's debt, it differs; for the process ever did and does run, *de terris de quibus il'i, aut aliquis ad eorum usum*. It is true, that in Sir *Charles Hatton's* case it was resolved, that the King's debt should be executed upon land wherein he had a power of revocation.

Mr. Keble, fo. 775. reports, That all process for the King's debts is, *de quibus D.* or any other to his use, is seized: So it differs largely from this.

I have seen a very accurate manuscript report of that case; by the favour of my brother *Legge*, which reports the difference in these words:

There is a difference between the King's debts and this case; for the King shall extend the land when there is nothing in the debtor but only a power: Otherwise here.

And that a power of revocation will subject lands to the King's extent, is held in Sir *Edward*

Edward Coke's case, Godb. 89. and other books, and cited in *Hob. 339.* and *Hardr. 24.*

It was then objected, that the King's prerogative must be immemorial; *Plowd. 322.* *Hardr. 27.* and no extent could have issued on such a bond as this till the statute of 33 Hen. 8. c. 39. s. 55. therefore the King can have no such prerogative.

I admit that the King's prerogative depends upon prescription, usage, or statute, which the court must determine; but when power is given by that statute to issue process upon such a bond by *capias* or *extendi facias*, as in their dispositions shall be expedient, such extents shall have the same effects as an extent issued upon a statute-staple or judgment at common law.

New things are governed by old laws, *Lane and Cotton.* 1 *Salk. 18.* 1 *Lord Raym. 654.*

It is further objected, That the King's prerogative can do no wrong; but the King can have no such prerogative as is here claimed, because it would be injurious and prejudicial to the subject. *Plowd. 487.*

The same law which gives the subject the property in his goods, establishes the King's prerogative; and here is no injury, though there may be some hardship: And the same objection would equally hold against *Stringfellow's case*, and the case of *the King against Crump and Hanbury*; and yet they are undoubtedly law.

Another

Objection. Another objection was, That this prerogative is not taken notice of in the statute *de prerogativa regis*.

Answer. The King has several prerogatives not enumerated in that statute. *Plowd.* 322. *the King and Queen and Dr. Birch,* 1 *Ld. Raym.* 23.

Objection. Another objection was, That the statute of 2 *W. & M.* was made in favour of landlords, and it could never be the intent of it to lessen the landlords former remedy.

Answer. It is so far from lessening it, that it has enlarged it, by giving the landlord power to sell after the expiration of five days; but this power supposes the property to remain in the tenant till a sale is made pursuant to the statute.

Objection. The last objection was, That where a prerogative is claimed by prescription, precedents ought to be shewn of the judicial allowance of that particular prerogative; but none are produced by the counsel for the crown.

To which I answer;

Answer. *First,* Though no precedents are produced, yet this case falls within the principle of *Stringfellow's case*, and of the case of *the King against Crump and Hanbury*, That where the property of goods is not divested out of the King's debtor,

debtor, they are liable to seizure upon an extent ; and where reason is the same, the law must be the same.

But, *Secondly*, Our predecessors above thirty years ago were of opinion, that goods distrained for rent, and not sold, were liable to seizure upon an extent.

The King and Dale, Easter 1719, in this court: An extent, bearing teste the 4th of November, issued against *Dale*, by virtue of which corn and hay were seized ; but *Mitchel* the landlord having distrained the same for rent the 29th of October before, refused to let it go ; upon which an attachment was moved for against *Mitchel*: The goods not having been sold within five days, pursuant to the act 2 W. & M. no property was divested by the distress, and they were in the landlord's hands only in order to his satisfaction ; but this being a point of law *Mitchel* was supposed not to understand, and being the sheriff was negligent in executing the *venditioni exponas*, the court refused to grant an attachment.

Here is an express authority in point ; and is not weakened by the objection, that the court did not grant an attachment, because it is every term's experience not to proceed to rigour and extremity, where a contempt is not wilful, but only by mistake ; and they in such case only take care to have justice done, or satisfaction made.

The plea therefore cannot be supported, without overturning a principle of law unquestionably

ably established, and contradicting the opinion of the court in the case of *the King and Dale*.

For these reasons, we are all of opinion, that judgment ought to be given for the King.

The defendant having succeeded to the title of a Baronet, brought a writ of error, directed to the treasurer and barons: assigned errors; and Mr. Attorney joined in error: And then the writ of error abated by the death of Sir *John Cotton*. And a question arose, Whether the new writ of error ought to be directed to the treasurer and barons, as the former writ was, or to Lord *Chancellor*? And Lord Chancellor *Hardwicke*, and the Lords Chief Justices *Lee* and *Willes*, after taking time to consider of it, delivered their unanimous opinion, in the exchequer chamber, that it ought to be directed to the treasurer and barons; according to Sir *William Pelham's* case, 1 Co. 11, 12. *Altonwood's* case, 1 Co. 34, 38. Sir *William Herbert's* case, 3 Co. 11, 15. and *Polhill and Cate*, 1 Jo. 14. But contrary to *Walsingham's* case, *Plow. Com.* 564, 565. and *Sav.* 39.

Lady *Cotton*, as executrix to Sir *John*, accordingly brought a writ of error, directed to the treasurer and Barons; assigned errors: And Mr. Attorney having joined in error, this case was argued before the Chief Justices *Ryder* and *Willes*, by Mr. *Starkie* for Lady *Cotton*, and by Mr. *Solicitor-General* for the King. And Mr. *Perrott* was retained by Lady *Cotton*, for a second argument; but he having nothing further

further to offer than had been insisted upon by Mr. Starkie, Lord Chancellor, by the advice of the Chief Justices, affirmed the judgment on Tuesday the 10th day of June 1755, in the Exchequer Chamber; and Lady Cotton, pursuant to the opinion of her counsel, acquiesced, and answered the value of the distress to the crown.

James Lamb *against* Christopher Gunman.

AN action of trespass was brought by the plaintiff against the defendant, in the court of King's Bench, for taking a quantity of wine described in the declaration.

The court removed an action into the office of pleas, where it appeared

that the revenue of the crown was concerned in the event of it.

The defendant justified, as servant to the Duke of Cleveland, for taking two tuns of wine for the duty of prisage, under a grant of King Charles the second, to the Duke's father, in tail-male, remainder to the first Duke of Grafton in like manner, reversion in fee to the crown.

The court removed the cause, upon reading the pleadings, into the office of pleas of this court, as the King's revenue was concerned in the event of the cause. *Hammond's case, Hardr. 176.*

Hilary

H I L A R Y T E R M,

25 Geo. 2. 1752.

The Attorney-General *against* Mrs. Rose Duplefis and others.

Where an information is exhibited to afford the King's title to the lands of a woman charged to be an alien, he cannot demur to the discovery, whether she is an alien or not, because the disability of an alien to hold lands is not a penalty or a forfeiture. Nor can the demur to the discovery whether her infant daughter (to whom the lands are devised) is an alien or not, and shew for cause that she may be examined as a witness to prove it, if she herself takes an interest in the same lands.

THIS is an *English* information, exhibited by Mr. Attorney-General against the defendant: which sets forth, that *Henry Hare*, late Lord *Colerane*, of the kingdom of *Ireland*, by his will duly executed, and dated the 6th day of *September* 1746, taking notice that his lady had lived separate from him, and that he had cohabited with the defendant *Mrs. Duplefis* ever since *April* 1740, and that she had brought him a daughter, whom he had named *Henrietta Rosa Peregrina*; Gave and devised all his estates to his daughter *Henrietta Rosa Peregrina*, in fee, in case she survived him, and lived to attain 21, or be married with the consent of her mother if living, or with the consent of her guardians by his own or her mother's appointment.

But if his daughter should die before 21, or marriage with consent as aforesaid, he limited

mited his estates over to his nieces, in the manner mentioned in his will.

He further willed, that from the time of his decease until his daughter *Henrietta* should attain her full age of 21, or be married with the consent of her mother, that the defendant Mrs. *Duplessis* should receive all the rents and profits of his estates, and her receipts should be sufficient discharges ; but when his said daughter should have attained 21, or should be married with her mother's consent, then the defendant Mrs. *Duplessis* should account with his said daughter for all the money arising from the premisses, and pay the same to her ; after deducting all expences in the management of the estates, together with three hundred pounds *per annum* for the maintenance of his said daughter.

The information states, That by indenture dated 30 Dec. 1748, Lord *Colcrane* granted an annuity or rent-charge of 160*l. per annum* to the defendant Mrs. *Duplessis*, during their joint lives ; and that if she survived him, it was to be increased from his death to 500*l. per annum* for her life, chargeable upon and issuing out of his estates.

Lord *Colcrane* made several codicils ; (but they are immaterial, and need not be stated;) and departed this life the 10th day of *August* 1749.

Then the information charges, That Mrs. *Duplessis* and her daughter are both aliens, born out of the legiance of the crown of *Great Britain*;

tain; and several facts and circumstances are alledged, to shew that they are aliens:

That the defendant Mrs. *Dupleffis* has entered upon these estates of Lord *Colerane*, and received the rents and profits of them; and that she is in possession of them:

That commissions have issued out of the court of chancery, in order to take inquisitions of his majesty's title.

And the defendants are charged with setting up entails and terms of years under family-settlements, to defeat his majesty's title at law.

The prayer of the information is, That the defendant *Dupleffis* may answer the several matters aforesaid; and that the validity of the grant of the annuity or rent-charge, and of the will, and his majesty's title to the estates, annuity, or rent-charge, may be tried at law, in such manner as the court shall direct; and that the defendants may be restrained from making use of the said terms on such trial: And if upon such trial it shall be found, that his majesty is intitled to such real estate and chattels real of the testator, that possession may be delivered to his majesty, with all deeds and writings, and general relief.

Mrs. Dupleffis's de-
murrer as
to herself,

As to so much of the information as seeks to compel Mrs. *Dupleffis* to discover whether she is an alien, born out of the liegeance of the crown of *Great Britain*, and where and when she was born; or that seeks to compel her

her to discover whether she is the daughter of such persons as are in the information named ; and whether her father was born at *Paris*, or elsewhere in *France*, and a natural-born subject of the *French King*, or where else he was born ; and whether he did not retire or withdraw himself from the kingdom of *France*, or elsewhere, into *Switzerland* ; and when he first went thither, and how long he lived or resided there ; and whether she was not born at *Neufchatel*, or where else, as she has heard or been informed, and doth believe ; and whether she was not baptized at *Neufchatel*, by such minister, and by such name, as in the said information are for that purpose set forth :

And whether she, and her father and mother, and such other persons as in the information mentioned, did not at or about the time therein mentioned, set out from *Newville*, to come to *England* ; and when they first came into *England*, or any of the dominions belonging to the crown of *Great Britain*.

And whether she has not owned or acknowledged to the other defendants, or some, and which of them, or to some other, and what person or persons, and whom and when, that she was born at *Neufchatel* ; or where else :

And whether she has not received such letter or letters, certificate or certificates, touching the time and place of her birth, and of her coming to *England*, as in the information is mentioned ; and when and from whom she received the same : And to whatever else tends

to a discovery of her being an alien, born out of the liegeance of the crown of *Great Britain*, or that seeks to have the pretended title of his majesty, to the estates, annuities or rent-charges in the information mentioned, tried at law, or that seeks to have the possession of the real estates and chattels real of the late Lord *Colerane* delivered to his majesty, together with all the deeds, evidences and writings relating thereto; Mrs. *Dupleffis* demurs. And for causes of demurrer sheweth :

*Causes of
her demur-
rer as to
her self.*

1st. That the title of his majesty to the said estates, if any he has, is a title merely at law, without any circumstance or ingredient to intitle him to the assistance of a court of equity.

2dly. That she is not bound to betray her own title to the said estates, or any of them; and therefore his majesty is not intitled to a discovery from her, whether she is an alien born.

3dly. That it doth not appear, that his majesty has any estate in the premisses in the information mentioned, nor can any act to be done by the court give his majesty any estate therein; and therefore his majesty is not intitled to any assistance from the court, until he has gained an estate therein by the ordinary course of law.

*Mrs. Du-
pleffis's de-
murrer as
to her
daughter.*

And as to so much of the information as seeks to compel Mrs. *Dupleffis* to discover, whether the defendant *Henrietta Rosa Peregrina Hare* is an alien, born out of the liegeance of the crown of *Great Britain*, and where and when

when she was born, and who was present at her birth; and where such persons live, or may be found or heard of; or where or by whom she has been nursed and maintained, boarded and lodged, from time to time, from her birth to the time of the filing the information; and where such persons who so nursed, maintained, boarded or lodged the said *Henrietta Rosa Peregrina*, live, or may be found or heard of:

And whether Mrs. *Dupleffis* did not at or about the time in the information mentioned, or at any other, and what time or times, set out from *England*, and travel with the late Lord *Colerane* into *Flanders*, *Germany* and *Italy*, or any other, and what foreign country; and whether she was not then with child by the said late Lord *Colerane*; and how long she remained in such foreign countries, before she returned into *England*, or any other of the dominions of the crown of *Great Britain*; and whether she was not resident at *Aix la Chapelle* and *Bergamo*, in the information mentioned; at the several and respective times therein also mentioned; and whether she did not write such letters from thence, of such respective dates as in the information are set forth; and whether the said *Henrietta Rosa Peregrina* is not the illegitimate daughter of the said late Lord *Colerane* by the said Mrs. *Dupleffis*:

And whether her said daughter was not born at *Crema* in *Italy*, or where else, out of the dominions of the crown of *Great Britain*, and at what place by name, and when and at what time;

time ; and whether Mrs. *Dupleffis* has not concealed the same from his majesty and the said Attorney-General ; and whether, the better to carry on such concealment, she has not caused the said *Henrietta Rosa Peregrina* to be called by the name of *Harriet Cocks* :

And whether the said *Henrietta Rosa Peregrina* was not baptized at *Colchester*, as in the information is suggested ; and whether such entry of such her baptism was not made in such register-book, as in the information is set forth ; and whether the said *Rose Dupleffis* has not owned or acknowledg'd to some, and what person or persons, and particularly to the defendants *Payne* and *Briggs*, that the said *Henrietta Rosa Peregrina* was born at *Crema* in the information mentioned, or elsewhere out of the liegeance of the crown of *Great Britain* ; and to whatever else tends to a discovery whether the said *Henrietta Rosa Peregrina* is an alien born : Mrs. *Dupleffis* demurs. And for cause of demurrer sheweth :

Cause of
her demur-
rer as to
her daugh-
ter.

That as to the several matters last mentioned, his majesty's Attorney-General, for and on the behalf of his majesty, may, when a proper course of proceeding shall be had to assert his majesty's title to the estates mentioned in the information to have been devised to the said *Henrietta Rosa Peregrina*, and such title shall be found, (if any such title his majesty shall be found to have,) examine her the said Mrs. *Dupleffis* to prove the fame : And therefore, as to those matters, the said Attorney-General, or his majesty, are not intitled to have any discovery from her in any other manner.

The

The demurrer was argued by counsel on both sides, several days in *Michaelmas* term last; and was adjourned to this term. And on the 12th day of *February*, being the last day of the term, my brethren and I delivered our opinions *seriatim*: And we were unanimously of opinion, that the demurrer ought to be over-ruled:

My notes of their arguments are too incorrect to be published. But my argument was to the following effect :

I shall premise a few things relating to the demurrer of Mrs. *Duplessis* as to herself.

First, That a person who hath an immediate right, in possession, reversion or contingency, or a mere possibility, may bring a bill in equity.

Secondly, It may be brought for the discovery and recovery of an equitable right, or for the discovery of a mere legal right, in order to maintain or defend a proper suit at law for such legal right.

Thirdly, That a defendant is obliged to answer every material fact stated in the information : Unless it will subject him to some penalty or forfeiture ; or unless he can plead as a purchaser for a valuable consideration, without notice whether the remedy be at law or in equity.

Fourthly, That a demurrer in equity as much admits all the facts stated in the information, as

Reasons
and autho-
rities for
over-ruling
Mrs. Du-
plessis's de-
murrer as
to herself.

as a demurrer at law does the facts stated in pleadings.

Fifthly, That a demurrer in equity must be good in the whole, or not at all: For it cannot be good in part, and bad in part, as a plea may be; because a plea is a defence against the demand in the information.

I will now consider the causes of demurrer particularly shewn; but shall invert the order of them, and begin with the third.

The third cause of demurrer is, That it doth not appear that his majesty hath any estate in the premisses in the information mentioned, nor can any act to be done by this court give his majesty any estate therein; and his majesty is not intitled to the assistance of this court, till he hath gained an estate therein by the ordinary course of law.

This reason is true in fact, That his majesty does not appear to have any estate in the premisses, and that no act to be done by this court can give him any estate; for the estate must be vested in his majesty by an inquisition upon a commission out of the court of chancery: But it does not follow, that his majesty is not intitled to the assistance of this court before an office found; because this estate being given to an alien, or in trust for an alien, his majesty has a right and title to it, though the estate does not actually vest in him till an office is found.

Page's case, 5 Co. 52. *a.* is express. An office of intitling vests the estate and possession of the land in the King, where he had but a right or title before; but the inheritance or freehold is not vested in him till an office found.

Hob. 231. An office of intitling, whereby the King's title is found; and before which, though the King have a title, yet the land is still the subject's.

And the reason why the King cannot come into possession without an office is, that there must be a record, according to the commonalty of *Sadler's case*. 4 Co. 54. *b.*

Mr. Attorney and the counsel for the crown cited several cases, to shew that the right or title which the King has antecedent to an office, is sufficient to maintain this information.

Musgrave against Parry, 2 Vern. 710. A child *en ventre sa mere* may maintain a bill in equity.

Fleming against Fleming, 19th July 1743, *in Canc.* There the estate was limited to the late bishop of *Carlisle*, for 99 years, if he should so long live; and then to his son for 99 years, without impeachment of waste: The bishop surrendered his interest to his son. And yet the heirs at law brought a bill to restrain waste; and Lord Chancellor granted an injunction.

Mitton against Wareing, 8th December 1743,
in Canc. Bill brought by the patron to prevent
digging mines in the glebe; and an injunction
to stay waste was granted by the master of the
rolls. *Rich. Lyford's case, 11 Co. 49. a. b.*

Lytton against Robinson, 12th December 1744,
in Canc. William Robinson Lytton Esquire, by his
will, dated 25th October 1729, devised to his
only son, John Robinson Lytton, and his heirs
for ever, all his manors, lands, &c. upon con-
dition that his sons should pay the portions due
to the testator's daughters, according to his
marriage-settlement; and if his son should not
attain the age of 21, leaving no issue, then he
devised all his said manors, lands, &c. to his
daughters, successively in tail-male; with re-
mainders: And willed and directed, that in
case his said son should attain the age of 21,
that his estates in London and other particular
counties should be sold, and the money arising
by sale equally divided among his daughters,
in augmentation of their fortunes: And the
share of any daughter or daughters, to go to
the survivors or survivor. The testator left a
son, and three daughters; and the son being
an infant, application was made on his behalf
to sell timber; and a bill was brought by the
daughters to prevent it: And the question was,
if their contingent right was sufficient to come
into equity? And Lord Chancellor held, that
their contingent interest was such as the daugh-
ters ought not to be deprived of; for they
might by contingency have the estate: And
granted an injunction.

Theſe

These authorities, in my apprehension, shew this cause of demurrer not to be well founded,

The second cause of demurrer is, that the defendant Mrs. *Dupleffis* is not bound to betray her own title; and that his majesty is not intitled to a discovery, whether she is an alien or not.

Boraston's case, 3 Co. 19. and 4 Leon. 1. shews that the defendant Mrs. *Dupleffis* took a chattel interest under Lord *Colerane's* will, till one of the events mentioned in the will happened; and that the infant daughter took only a future contingent estate; and that the inheritance in the mean time descended to Lord *Colerane's* heirs at law. But this is agreed by the counsel on both sides.

But the defendant Mrs. *Dupleffis*, and the infant daughter, are both charged by the information to be aliens; and that charge is upon this occasion to be considered as true: How then did the defendant Mrs. *Dupleffis* take this chattel interest? She took it and holds it for the benefit of the King, though it will not actually vest in the King till office found.

And the case put by one of the defendant's counsel, is directly otherwise than he supposed it: For if a subject and an alien are joint purchasers of land, and the alien dies, the whole land shall not survive absolutely, but subject to the King's title; for upon office found, the King shall have a moiety. *Page's case*, 5 Co. 52. b. 1 Inst. 186, a. 4 Leon. 82. Which shew that

that the alien does not take for his own, but the King's benefit.

The reason why the King shall have the land purchased by aliens is, that the kingdom may not be impoverished by them. *Aelyn. 14. the King and Holland.*

The case of *the Attorney-General against Sir George Sands*, is reported in *Hardres* 488. But I have a manuscript copy of Lord Chief Baron Hale's argument in that case; and because I think part of it very pertinent upon this occasion, I will cite it *verbatim*.

If an alien be *cestuy que trust*, at this day, of an inheritance, the trust shall be executed in a court of revenue for the King; *Holland's case*, 21 Car. 1. This was in effect agreed. And the reason is, because the alien had no capacity to purchase for any one but the King; and because of the infinite inconveniences that might follow, by letting in aliens to the possession of our land; I was counsel (he says) in *Holland's case*: there the King was intitled by prerogative, upon the account of the incapacity of the alien to purchase; there, though the King could not have the interest in point of law, and an information of intrusion would not lie, yet by a bill in equity it might have been decreed.

Having shewn that an alien can only purchase for the King's benefit, I will now consider whether the defendant Mrs. *Duplessis* ought to discover whether she be an alien, or not.

I think

I think that she ought to make the discovery ; and that she, by discovering, cannot lose what she never had ; for she did not take for her own benefit, but the King's : And the cases cited upon this head, when properly observed upon, warrant this opinion.

In the case of *Smith and Read*, *Trin. 12 Geo. 2. in Canc.* cited from *Bacon's Ab. vol. 3. p. 799*, Lord Chancellor held that the defendant was not obliged to discover, whether he was a papist or not ; because the disabilities and incapacities imposed by the statute of 11 & 12 W. 3. are imposed by way of penalty upon all persons exercising that religion : But his lordship says, this is not like the case of an alien or bastard, who are incapable by the general laws of the land to inherit.

I have a manuscript note of this case, from the late Mr. Bayley ; and he mentions it to be determined on the 19th of *March 1736*, and that the plea was allowed for the reasons already given ; but then he reports, that Lord Chancellor distinguished the cases of aliens and bastards thus ; that by the common law, an alien was not a person capable of purchasing, nor a bastard of inheriting, and therefore, as such persons have no colour of title, it may be reasonable for them to discover, whether aliens or bastards, or not,

Harrison against Southcote, in Canc. 31 July 1751. Lord Chancellor held, that though the defendants might avail themselves of the statute

tute 3 Geo. 1. for their defence, yet that they were not obliged to discover, whether they claimed under a papist, or not.

I agree both these determinations to be perfectly right: But Lord Chancellor himself has distinguished from the present case; and I will endeavour to enforce the distinction.

Before the statute of 11 & 12 W. 3. A papist had as good a natural right to take by purchase, as any other subject; that statute has laid him under an incapacity to purchase, and is penal: And he shall not discover that incapacity; let those who claim to his prejudice prove their case as they can.

But this was never the case of an alien; he by law could never purchase for his own benefit, but only for the benefit of the crown; and therefore he shall be obliged to discover what belongs to the crown.

Monnins and Monnins, 2 Ch. Rep. 68. A demurrer to a bill for discovering, whether the defendant was married, held good; because if married she forfeited her estate.

This is the case of a forfeiture, which falls within my rule.

Wrottefly against Bendish, 3 Peer Williams 235. daughters under a settlement, were intitled to portions, provided that if any daughter should marry without the consent of her mother, then she should forfeit her portion, and it should go over to the other daughters. The demurrer

murrer to the bill was allowed by Lord *Talbot*: But this will admit of the same answer; that it is the case of a forfeiture.

There were other cases cited for the King.

The protector against Lord Lumley, Hardr.
22. An outlaw obliged to discover his estate for the benefit of the crown: though he insisted, *Nemo tenetur seipsum prodere.*

Richards and Richards was a case of bastardy, and no demurrer to the discovery.

May against May, 26th April 1734, in *Canc.* Bill to perpetuate testimony, against the marriage of *Charles May*, father of *Baptist May*; suggesting that the plaintiff was the right heir, under a limitation in a settlement, if *Charles May* had no son. And the bill charged, that *Charles May* was not married till after the birth of *Baptist*; and that he was illegitimate: And a private act recited, that *Charles May* was not married when *Baptist* was born. And *Charles May* was examined by the judges and lords: And he was asked, whether he was not examined by the judges and lords; and he demurred to that question; but Lord *Talbot* over-ruled the demurrer.

Adlington against Cann and another, 28th July 1740, in *Canc.* This was a bill brought by the daughter and heir at law of the testator, charging that the estate was devised upon secret trusts to charitable uses. The defendants pleaded the statute of frauds; and that a parol trust was

was void. But Lord Chancellor was of opinion, that they should answer. And yet there would have been a disability and loss of the estate, by the mortmain act 1736, if it had come out that it had been formally devised upon a trust to charitable uses.

Lucas against Evans, 6th Aug. 1745. Devise to the testator's wife, and if she marries that she shall lose half of his personal estate; On demurrer, Lord Chancellor held this was no matter of penalty but a mere civil right to have the estate upon a contingency. And he distinguished this from the case of a marriage without consent; for there the person who claims shall not have a discovery. Mr. Attorney apprehended, that Lord Chancellor considered the principal case as upon a limitation; and the other as a forfeiture, for a breach of the condition.

The first cause of demurrer is, that the title of his majesty, if any he hath, is a title at law, without any equitable ingredient.

Mr. Attorney admits it is; but that is no reason of itself, why his majesty should not have a discovery of such matters as are within the defendants knowledge, and will make out that title.

For it is suggested in the information, that a discovery is necessary to enable the crown to proceed upon the commissions which have been issued under the great seal, and that is sufficient.

The

The cases on this head are innumerable ; but I shall only take notice of one of them, because it was cited.

Smithies against Lewis, 1 Vern. 398. It was held by Lord Chancellor Jeffreys, upon a demurrer, that the plaintiff who had recovered at law was intitled to a discovery, whether the defendant's estate was fraudulently conveyed to trustees, to protect it against the plaintiff's execution.

As to the objection made by the King's counsel, that the demurrer is too general, being to every thing that tends to a discovery of the defendant's being an alien, I think that it is well enough : because the demurrer being to particular questions mentioned in the information, and the information, after enumerating particulars, asking the question generally, the demurrer properly pursues the words of the information : Though I admit, that demurring or pleading to what is not answered to, is informal and bad ; because the court must look through the bill and answer to pick it out, which would be endless.

The demurrer to the relief is, as to what seeks to have the title of his majesty to the estates, annuity or rent-charge, in the information mentioned, tried at law ; or that seeks to have the possession of the real estate or chattels real of the late Lord Colerane delivered to his majesty, with all the deeds, evidences and writings thereto belonging.

I think that there must be an office found, by virtue of a commission under the great seal, and

M

that

that this court cannot dispense with it, by directing his majesty's title to be tried in any other manner; nor do I see that we can dispose of the possession or deeds till an office is found for the King: For it is that which vests the estate in his majesty; and the possession and deeds must follow the estate, as the shadow does the substance. But still this demurrer must be over-ruled; for being bad in part, it is so in the whole.

A case cited in support of Mrs. Duplessis's demurrer as to her daughter.

As to the demurrer to the discovery of the infant's being an alien, Mrs. *Duplessis*'s counsel insisted that it ought to be allowed, because she might be a witness upon a proper proceeding. And cited the case of *Vernon and Airy*, 16th November 1737, in *Canc.* The defendant was no way concerned in interest, but had several letters of a material defendant in his hands, wrote to his testator: He demurred to the discovering and producing the letters. And the demurrer was allowed, and rightly; because he was not concerned in interest.

Reasons for over-ruling her demurrer as to her daughter.

But there seems to me to be no colour for this cause of demurrer in the present case; because Mrs. *Duplessis* took an interest by Lord *Colerane*'s will; and she is charged with having entered upon Lord *Colerane*'s estates, and with receiving the rents and profits, for which she was to be accountable to the infant at 21 or marriage; and may, eventually, be accountable to the King for them.

But as to some of the questions which the defendant Mrs. *Duplessis* has here demurred to, I think that she ought not to answer them; as whether

whether she was not with child by Lord Colerane, and whether the other defendant *Henrietta Rosa Peregrina Hare* is not the illegitimate daughter of Lord Colerane by her; for the discovery of these matters, might subject her criminally to ecclesiastical censures.

However, as the demurrer relating to the daughter is bad in part, it is so in the whole, and must be over-ruled. And accordingly, the demurrer to the different parts of the information was over-ruled by the whole court.

Mrs. *Duplessis*, appealed from this order for over-ruling her demurrer, to the House of Lords; and their Lordships, after hearing counsel on both sides, put the following question to the judges present, on *Tuesday the 13th day of March 1753.*

Whether the legal disability of an alien to hold lands, was a penalty or a forfeiture?

Lord Chief Justice *Willes*, having conferred with Mr. Justice *Wright*, the other judge present, delivered their opinion, that the legal disability of an alien to hold lands, was not a penalty or a forfeiture.

He said, that a penalty or a forfeiture was inflicted for some act or neglect, in contempt of the law; but that the disability of an alien to hold lands arose from the policy of the law, without any such act or neglect: And compared it to the incapacity of an infant or feme-covert to grant. And said, that there was no difference in respect of the incapacity, whether it was in the grantor or grantees.

Lord Chancellor concurred with the judges : And declared his opinion, upon the demurrer as to Mrs. *Dupleffis* herself ; that the crown had a right to a discovery, whether Mrs. *Dupleffis* was an alien or not : That it was not a prerogative right, but the same right that every subject had to a discovery ; either to supply evidence, or to prevent expence and delay in procuring evidence ; which would be infinite in the present case, if commissions were to be sent abroad, to examine witnesses relating to her birth, &c.

And as to the demurrer relating to the daughter, his lordship said, that Mrs. *Dupleffis* had an uncertain chattel interest ; which, according to *Boraston's case*, 3 Co. 19. was to determine on the infant's death, or age of 21 years or marriage ; that this was a trust, for she is to account to the infant, if she lives to 21 or to be married : And that this might be a trust, eventually, either for the heirs at law, the infant, or the King : For if she died before 21 or marriage, it would be a trust for the heirs at law ; and if she lived to 21 or marriage, and was an alien, it would be a trust for the King. So that a court of equity might appoint a receiver, and take care that the rents and profits were not embezzled, but secured to the persons who should in the event be intitled. And to this end she ought to discover, whether her daughter is an alien or not. And was therefore of opinion, that the order of the Court of Exchequer was right, and ought to be affirmed. And it was accordingly affirmed.

Hilary

H I L A R Y T E R M,

26 Geo. 2. 1753.

The King *against* John Dibbens.

THE defendant was convicted on the statute 1 W. & M. c. 18. s. 18. at the quarter sessions for the county of *Somerset*, for making a disturbance in a church during the time of divine service; whereby he was to suffer the pain or penalty of 20*l.* to his majesty's use.

Mr. Gapper moved, the last term, to discharge this penalty; upon an affidavit of the defendant's being out of his sences, and of his inability to pay it. And it appeared that he had lain in gaol above two years. But this being a certain fixed fine by statute, I and my brothers *Legge* and *Smythe* had at first some doubt of our power; but, on considering the privy seal, Geo. 2. which empowers the barons to compound or discharge all forfeitures of recognizances, penalties, fines, issues, amerciaments, and other sums of the nature of recognizances, fines, issues and amerciaments, whereby the subjects are chargeable to his majesty, we were of opinion that the privy seal extended to this case.

case. And I cited a precedent from the treasurer's remembrancer's office, of the 21st of November, 6 W. & M. where, upon a motion to compound a fine set on an offender, the court ordered precedents to be searched, whether fines judicially set had been compounded: And on the 5th of February following, the defendant was admitted to compound. And this was thought a very strong case in favour of the present defendant: Because when a court of justice has set a certain fine for an offence, the offender is by the judgment as liable to be imprisoned for the nonpayment of it, as when the penalty adjudged is fixed by statute; and there is the same reason that the subject should be relieved in the one case, as the other. And since the words of the privy seal were large enough to include the present case, the court discharged the penalty, and ordered a *liberes e Prisone* for the defendant's relief.

See the act 4 Geo. 3. c. 10. for the more easy discharge of recognizances estreated into this court.

Easter

E A S T E R T E R M,

27 Geo. 2. 1754.

The King *against* the inhabitants of the Artillery Ground in Tower Division, and Thomas Bray, Esquire.

IN the account of Sir *Robert Baylies*, receiver of the duties on houses for the county of *Middlesex*, two supers were set on the inhabitants or collectors of the *Artillery Ground in Tower Division*, for the year 1738 ; one for 59*l.* 2*s.* and the other for 31*l.* 15*s.* for so much money received and detained in their hands, on account of the duty on houses.

The collectors of the window duty are only answerable for what they respectively receive, but not for the deficiency of each other.

And both the inhabitants and Mr. *Bray*, one of the collectors, have obtained several orders to shew cause, why the supers should not be discharged, and process stayed.

The case, by the affidavits of Mr. *Bray* and *Henry Davis*, appears to be, That Mr. *William Batchellor* and Mr. *Bray* were appointed collectors of these duties for the year 1738 ; that the collecting book was delivered by *William Batchellor* to *Henry Davis*, (from whence it is to

to be presumed that the commissioners delivered the book to *Batchellor*; that *Davis* collected the money, and paid it to *Batchellor*, except 3*l.* or thereabouts, which he was ready to deliver to Mr. *Bray*, with the collecting book.

And the question is, Whether the inhabitants are (or Mr. *Bray*, as a joint officer and accountant, is) answerable for this deficiency of Mr. *Batchellor*?

This question depends upon the construction of the acts of parliament which create these duties and appoint the collectors of them; the material clauses whereof relating to this question, it will be necessary to state.

By the act 7 & 8 W. 3. c. 18. s. 4. It is enacted, That the assessors shall return the names of two or more able and sufficient persons, within the bounds or limits of those parishes or places where they shall be assessors respectively, to be collectors of the several rates and duties granted to his majesty; for whose payment unto the receiver-general or his deputy, of such money as they shall be charged withal, the parish or place by whom they are so employed shall be answerable.

By sect. 5. The commissioners are to issue their warrants for collecting the duties, as they become payable; of all which the collectors are required to make demand of the parties chargeable therewith, within ten days after they become payable; and upon payment thereof, to give acquittances under their hands unto

unto the several persons who shall pay the same : And such acquittances shall be a full and perfect discharge against his majesty, to every person who shall pay the same. Collectors are to pay, within twenty days after receipt, to the receiver-general, or his deputy. The commissioners, in default of payment, are to levy by warrant under the hands and seals of two or more of them, upon the collectors, by distress and sale of his or their goods and chattels, such sum and sums of money as he hath received, or as ought by him to have been paid, and is not paid by reason of his failure in doing his duty.

By *sect. 7.* If persons charged refuse to pay these duties, it shall be lawful for the officer or collector to distrain.

By *sect. 9.* Two or more justices are to inquire into the number of windows, and to enlarge or abate the assessment, and sign the same ; and shall likewise nominate and appoint two of the persons named in the said certificate or assessment to be collectors for the respective divisions and places for which they were so presented ; and shall deliver, or cause to be delivered, such assessment so by them allowed of, unto the respective persons by them nominated to be collectors for the year ensuing , who are hereby strictly enjoined and required, to collect and pay the several rates and duties so rated and assessed, and to give acquittances, according to the directions herein before contained for and touching the collectors of the duties.

By

By *sec*7.** 14. If any collector shall neglect to pay, the commissioners are to seize his person and estate, and to sell the estate so seized.

The act 6 Geo. 1. c. 21. s. 61. recites the act 7 W. 3. c. 18. and the 9th section of the 8 & 9 W. 3. and that it is found by experience, that in some places the collectors do name insolvent persons to succeed them, who run away and leave a debt on the parish or place ; which, being answerable for the collectors, is often vexed with process, without having any power, as the law now stands, to raise the arrears so incurred, by a re-assessment : For remedy whereof, be it enacted, that from and after the first of *August* 1720, the said justices of the peace, who are commissioners for the said duties, or any three or more of them, shall and may, within their respective limits, appoint two such persons as they shall think able and responsible, to be collectors within the said parishes and places, or any of them, of the said duties on houses, from time to time, (whether their names be or be not presented by the preceding collectors as aforesaid;) and in case there shall be any arrear of the said duties on houses, by reason of the failure of any such collector or collectors as aforesaid, for which any parish or place shall be answerable, it shall and may be lawful to and for any three or more justices of the peace, being commissioners for the said duties on houses, to cause such arrear to be re-assessed within the same parish or place respectively, on all such houses as are liable to the payment of the said duties on houses and to cause the same to

to be raised ; and (for default of payment) to be levied by such ways and means as the duties on houses are to be raised and levied in such parishes and places respectively, and to cause the money so raised or levied to be paid to the receiver-general of the said duties, or into the exchequer, for the respective uses and purposes whereunto such arrears (if they had been duly paid by the said collectors) are appropriated and appointed, by the several acts of parliament in that behalf : Any law or statute whatsoever to the contrary notwithstanding.

But it is objected, on the part of the crown and the inhabitants of the *Artillery Ground*, That Mr. *Bray* is to be considered as a joint accountant to the crown with Mr. *Batchellor*, and therefore liable to make good his deficiency. And to prove this, the case of *Gill* and *the Attorney-General*, Hardr. 314. is cited ; where it was held that if there are joint accountants, each is liable for the whole in the King's case, though not received by himself ; but that the law is otherwise in the case of common persons : As in the case of joint executors, none is answerable for more than comes to his hands severally. But yet in that case, if by agreement among themselves one be to receive and inter-meddle with such a part, another with such a part, each of them will be chargeable for the whole ; because the receipts of each are pursuant to an agreement made between both.

Lord *Hale* and the court were considering the case of joint accountants, where they become so by their own voluntary acts, and thereby engage for the conduct of each other ; and if

if they were not to be answerable for each other's receipts the crown would be remediless : But here an office is imposed upon the collectors, under a penalty ; and if they are not answerable for each other's deficiency the crown is safe, for the parish or district is expressly made liable for the deficiency of the collectors.

By the 5th section of the act, 7 & 8 W. 3. collectors are to make demand ; and, on payment, to give acquittances, which shall be a discharge. This seems to import, that the collectors were to join in all acts, and if it were so, it would be like the case of trustees, who are not answerable for each other's receipts, because they must join in the execution of their trust. But by the latter part of this section, there is a remedy given, by distress and sale of the goods of the particular collector not paying what he has received ; and this is enforced by section 14. And so they are considered, not as joint collectors, but like executors ; who (though they may act separately) are not answerable for more than comes to their respective hands, unless they join in receipts or other acts, and it cannot be known what part of the assets each executor received ; in which case each of them will be chargeable with the whole assets. And this difference between trustees and executors is taken in *Fellowes against Mitchell and Owen*, 2 Vern. 515. and in *Churchill against Lady Hobson*, 1 P. Williams 241.

But in this case Mr. *Bray* has not acted or given any receipt ; nor will his neglect to act be sufficient to charge him, as it does not appear that any assessment was delivered or tendered to him,

him, though it is expressly required by the 9th section of the act, till all the money had been collected but about three pounds.

And this construction ought the rather to prevail in favour of Mr. *Bray*; for otherwise (as his counsel objected) it would be in the power of the commissioners to join a beggar as a collector to a man in good circumstances, and to subject him to the deficiency of the beggar.

It was then objected by the counsel for the inhabitants of the *Artillery-Ground*, that by the 6 Geo. 1. the re-afseessment is to be on all houses liable to the duties; and so persons who have come into the liberty since the afseessment will be liable to make good a deficiency which incurred by the insolvency of a collector before they had any concern in the parish; which would be a great hardship upon them. But the answer is, that if it be a hardship, it is a hardship which the act has laid upon them; and it would have been impracticable to have raised the deficiency otherwise: But the chance of removing out of a liberty where there is a deficiency, is equal to that of removing into a liberty where there is a deficiency; and so the hardship (if any) is quite accidental.

But we have been attended with two precedents that are in point; but one only on debate.

The case of *Bowers Church*, 2d May 1749, in the King's remembrancer's office, was—That he and *Samuel Angel* were appointed collectors for the duties upon windows for the ward of

of *Charing-Cross*, in the parish of *St. Martin in the Fields*, within the liberty of *Westminster*, for the year 1746; and that *Angel* solely acted as collector in the ward; and that *Bowers Church*, declining to act as collector, never did collect any money within the parish, on account of the duty; notwithstanding which, the sum of 160*l.* 6*s.* had been returned insuper on the said *Bowers Church* and *Angel*, as collectors of the ward of *Charing-Cross*, in the account of Sir *John Bosworth*, receiver of the duties. An order to shew cause, why the insuper should not be discharged against *Bowers Church*, and all process stayed thereon, was made absolute, on affidavit of service: So this passed *sub silentio*.

30th May 1749. The case of *Samuel Monday* and *Henry Phillips*, in the King's remembrancer's office, was thus: That *Monday* and *Phillips*, together with *Perriz*, otherwise *Parran Martin*, were appointed collectors for the rates and duties upon houses, for *Rupert-Street* and *King-Street* wards, in the parish of *St. James Westminster*, for the year 1746; but that no book or books was or were delivered to *Monday* or *Phillips* to collect the said duties, nor did they or either of them receive any part of the duties, nor sign any receipt for the same, till after *Martin*, who was the only collector who had received any of the said duties, had absconded; and thereupon *Monday* accepted the book to collect the residue of the said taxes for *Rupert-Street* ward, and collected 6*l.* 15*s.* 6*d.* and *Phillips* accepted the book to collect the residue of the taxes for *King-Street* ward, and collected 9*l.* 8*s.*
That

That a warrant being issued against *Martin*, he paid *Monday* and *Phillips* 200*l.* in part of the money collected by him; which sums of 200*l.* 6*l.* 15*s.* 6*d.* and 9*l.* 8*s.* *Monday* and *Phillips* paid to the receiver-general of the said duties, for the year 1746: Notwithstanding which, 47*l.* 15*s.* 6*d.* hath been returned insuper on the said *Samuel Monday*, or collector in the ward of *Rupert-Street*, and the sum of 104*l.* 19*s.* hath been returned insuper on *Henry Phillips*, as collector in the ward of *King-Street*, in the account of the receiver-general, and process of *Distringas* hath issued. It was ordered that Mr. Attorney-General should shew cause, why the supers should not be discharged against the said *Monday* and *Phillips*, and all process stayed thereon. And in *Michaelmas* term following, on hearing Mr. Attorney-General for the crown, and Mr. *Starkie* for the inhabitants, and the late Mr. *Ford* and Mr. *Evans* for *Monday* and *Phillips*, the order was made absolute. And this is a case determined upon debate.

The order, in the principal case, was made absolute for discharging the supers, and staying process against Mr. *Bray*; but the supers and process were continued against the inhabitants of the *Artillery-Ground*, for levying the several sums set upon them by the said supers.

TRINITY TERM,

27 & 28 Geo. 2. 1754.

The King *against* Buchanan and Hamilton.

Where the
court will
quash an
extent and
inquisition,
and grant a
new extent
of the for-
mer teste.

A N extent issued against the defendants ; on which an inquisition was taken, and goods, &c. were seized into his majesty's hands. They became bankrupts. But afterwards it was discovered, that there were some cloths in the hands of a packer, belonging to them. And Mr. Perrott, on an affidavit of this fact, moved to quash the extent, and inquisition ; and to have a new extent, of the same teste as the former, in order to find and seize these cloths : And obtained an order to shew cause, upon notice to the packer and the assignees of bankrupts ; which was made absolute, upon an affidavit of service, on 13th of July 1754.

H I L A R Y T E R M,

30 Geo. 2. 1757.

The King *against* James Jetherell.

THE defendant *Jetherell*, being indebted to *James Harkness Esquire, receiver-general of the county of Cambridge*, in the sum of 859*l.* an extent in aid issued against him for the same, on the 23d of *January 1755*, directed to the sheriff of the county of *Huntingdon*; and by virtue of an inquisition taken thereon, he took and seized several goods into his majesty's hands, which were appraised at 2000*l.* and upwards.

The defendant *Jetherell*, being likewise indebted to *Henry Southwell Esquire, receiver-general of the county of Huntingdon*, in the sum of 500*l.* another extent in aid issued against him for the same, on the 27th of *January* aforesaid, directed to the said sheriff of the county of *Huntingdon*; and by virtue of another inquisition taken thereon, he took and seized the same goods, which were appraised at 2000*l.* and upwards, as aforesaid.

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The

The seizures were made at different times, and in four different towns in the said county ; and after the proceedings before mentioned, the several sums of 859*l.* and 500*l.* were paid by the assignees under a commission of bankruptcy against the defendant *Jetherell*, to Mr. *Thomas Johnson*, under-sheriff of the said county of *Huntingdon* ; who paid over the said 859*l.* to the said *James Harkness*, and the said 500*l.* to the said *Henry Southwell*.

That Mr. *Harkness* and Mr. *Southwell* had not paid Mr. *Johnson* poundage, or his costs and charges in executing the extents, according to their agreements.

Mr. *Perrott* therefore moved, the last term, that Mr. *Harkness* and Mr. *Southwell* might respectively pay Mr. *Johnson* poundage on the said extents, and his costs and charges relating thereto, and his costs of this application ; and that it might be referred to the deputy-remembrancer, to settle the same : Which, upon reading the affidavits of the said Mr. *Johnson*, and the said extents, inquisitions and agreements, was accordingly ordered, unless cause, the first day of this term.

Mr. *Starkie* shewed cause, for Mr. *Harkness* and Mr. *Southwell*, against the order ; and made several questions.

First, Whether the sheriff was intitled to any poundage at all ? And he insisted that the statute 29 *Eliz.* c. 4. only related to private executions ; and by the statute 3 *Geo. 1.* c. 15. s. 3. Sheriffs who levy the King's debts are to have

have an allowance of poundage, upon their accounts; but this does not extend to extents in aid, for here no account is to be passed.

Secondly, Supposing the sheriff intitled to poundage, whether he was intitled to the whole poundage, or only to a proportionable part of it; as he went out of office before a *venditioni exponas* could have issued, by the course of the court? And he insisted, that if the debts for which the extents issued had not been paid, the goods must have been sold under a *venditioni exponas*, and the new sheriff, by the 9th section of the statute, would have been intitled to a proportionable part of the poundage.

Thirdly, Whether poundage could have been retained? And he insisted it could not, unless there had been an actual levy: And cited *the King and Burrell, Bunbury 305.*

Fourthly, Whether this was a matter proper to be determined on a motion; And he insisted it was not; and that the sheriff ought to be left to his remedy, by action or otherwise, for his poundage.

Fifthly, Whether the sheriff is intitled to any satisfaction for costs and charges, beyond his poundage? And he insisted that he was not.

But it was answered by Mr. *Perratt*, and resolved by myself, brothers *Legge* and *Adams*, in the absence of brother *Smythe*, as to the first question—That the subject who makes use

of the King's prerogative ought not to be in a better condition than his majesty himself would be ; that the sheriff has done every thing in his power for the benefit of Mr. *Harkness* and Mr. *Southwell*, by executing their extents ; that they have had the fruit of their extents : And the money paid to them respectively may be considered as levied or collected, within the very words of the third section of the statute ; Sir *Daniel Norton*'s case, *Lane* 74. And as to the words, that the sheriff shall have his allowance upon his account ; that is only directory, where he has not received poundage before, and is to secure it more effectually ; and it would be a strange construction, that what was intended to secure should destroy the right to poundage : And therefore the natural construction is, that if the sheriff should have disbursed more for the crown than he had received, he should be allowed poundage upon his account. And the case of *the King and Burrell* is express, that the sheriff may retain poundage, without waiting for the allowance of it upon his account : And so it was held in the case of *the King and Whitehead*, *Easter* 1751, upon an extent in aid of Mr. *Burroughs*, collector of the customs at *Bristol*.

As to the second question—We held that the sheriff was intitled to the whole poundage ; because the poundage, by the 9th section of the statute, is only to be proportioned where the seizure is by one sheriff, and the goods sold by another ; but here the whole money is collected and paid to the prosecutors of the extents, by one and the same sheriff.

The

The third question, Whether the sheriff may retain poundage? depends upon his right to it; and is consequential, upon the determination of the two former questions in his favour.

The fourth question is not new; for in former cases we have held the right to poundage proper to be determined on a motion.

As to the fifth question, it depends upon the 14th section of the statute; and we thought the sheriff, in the present case, intitled to no allowance beyond poundage.

We therefore made the order absolute for poundage; but discharged it as to the costs and charges relating to the extents, and the costs of this application.

H I L A R Y T E R M,

31 Geo. 2. 1758.

Attorney-General *against* Roger Hines.

An information in this court upon the statute 12 Car. 2. c. 32, for laying woolen yarn on board a vessel for exportation, may be laid in any county; because the offence is transitory, and there are no negative words in the statute.

THE information charged, that the defendant, between the first day of March 1750, and the day of exhibiting of the information, in *Michaelmas* term then last, (to wit) at *Ratcliff* in the county of *Middlesex*, within the port of *London*, did load or lay on board, or cause to be loaden or laid on board, in a certain ship or other vessel to the Attorney-General unknown, one thousand and sixty pounds weight of yarn, made of wool of the growth of *Great Britain* or the dominion of *Wales*, to the intent or purpose to export, transport, carry or convey the said yarn made of wool, or to cause the same to be exported, transported, carried or conveyed, into parts or places out of the kingdoms of *Great Britain* and *Ireland*, the dominion of *Wales*, town of *Berwick upon Tweed*, and the isles of *Jersey* and *Guernsey*, with *Sarke* and *Alderney*, contrary to the form of the statute in that case made and provided: Wherefore his majesty's said Attorney-General, on behalf of his said majesty, prayed the consideration of the court in the premisses; and that

that the said defendant might, for the offence aforesaid, forfeit the sum of one hundred and fifty-nine pounds eighteen shillings, of lawful money of *Great Britain*; being three shillings for every pound weight of the said yarn made of wool so loaden or laid on board, or caused to be loaden or laid on board the said ship or other vessel as aforesaid, contrary to the form of the statute aforesaid.

The defendant pleaded not guilty. And issue being joined, it appeared upon the trial, that the offence was committed in *Essex*, and that the defendant was not apprehended or arrested in *Middlesex*; and the information being grounded upon the statute 12 *Car. 2. c. 32.* it was objected by the defendant's counsel, that the offence could only be enquired of and tried in the county where it was committed, or where the offender was apprehended or arrested; and that there ought to be a verdict for the defendant: But the fact being fully proved, there was a verdict for the King, and this point reserved for the opinion of the court.

Mr. Starkie moved the court, the last term, to set aside the verdict, and for a new trial; and insisted that this was a case within the equity of the statute 21 *Ja. 1. c. 4.* according to Lord Chief Justice *Holt*'s private opinion, in *Hicks's case*, 1 *Salk. 373.* And that by the 1st and 2^d sections of it, all informations for offences to be committed against any penal statute are to be laid in the county where committed, and not elsewhere; and if not so proved, there shall be a verdict for the defendant.

Sect.

Sect. 5. Proviso, That it shall not extend to any information or action, for transporting wool, woolfells, or leather; but that such offence may be laid in any county, at the pleasure of the informer.

He observed, that this proviso would not include the present information for laying woollen yarn on board a ship or vessel with intent to transport it; for here no transportation of wool is alledged; and woollen yarn is wool partly manufactured, and a different thing from raw wool.

He then stated the 3d and 5th sections of the statute 12 Car. 2. c. 32.

Sect. 3. Disposes of penalties and forfeitures, one moiety to the King, and the other to him that shall sue for the same, by action of debt, bill, plaint or information, in any of his majesty's courts of record, or before the justices of assize, or in the general quarter sessions of the peace; in which suit no escoin, protection, or wager of law, shall be allowed.

Sect. 5. That every offence that shall be done or committed contrary to this act, shall and may be enquired of and heard, examined, tried and determined, in the county where such wool, woolfells, mortlings, shortlings, yarn made of wool, woolflocks, &c. respectively, shall be so packed, loaden or laid on board as aforesaid, or else where such offenders shall happen to be apprehended or arrested for such offence, in such manner and form, and to such effect, to all

all intents and purposes, as if the same offence had been wholly and all together done and committed at and in such county.

He then objected, That this is a new offence, and the manner of proceeding directed by the statute which creates it; and though here are only affirmative words, yet this offence is made local, to be tried in the county where committed, or where the party was apprehended.

He took the difference between cases where there is an antecedent offence, and a subsequent statute directs the manner of proceeding; and where a new offence is created, and the manner of proceeding is directed by one and the same statute: In the former case negative words are necessary to make the offence local, in the latter they are not.

And he cited *Stradling's* case, *Plow. Com.* 206. and Dr. *Foster's* case, 11 *Co. 59*, 64. on the statute of 31 *Ed. 3.* of writs of error brought upon judgments in this court, that the power of the Lord treasurer and judges appointed by the King's commission is taken away by the authority given to the Lord Chancellor and Lord Treasurer to examine the errors in those judgments; and yet there are only affirmative words: And the reason is, That the designation of these two great officers is exclusive of others, in this statute introductory of a new law.

So in the case there mentioned, upon the statute 27 *H. 8. c. 7.* a grant of lands within the survey

survey of the court of augmentations must be under the seal of that court; and a grant under the great seal is void.

And to enforce his objection, he insisted that the authority given to try in the county where the offence was committed, or the party apprehended or arrested, would be nugatory and could have no effect, unless the court should put the construction upon these words which he contended for.

Mr. Attorney-General, *contra*.

This is an information for an offence against a statute, and it is transitory in its own nature, and may be laid in any county, at the election of the crown.

And in answer to Lord Chief Justice Holt's private opinion in *Hicks's case*, he cited *the King against Gaul*, 1 Salk. 372. 1 Lord Raym. 370. and *Hicks's case*, 1 Salk. 373. and *Harris against Reyney, Easter 1734. B. R.* where the judges agreed that the statute 21 Jac. 1. did not extend to any offences created since the making of it; and the reason of it is, That the preamble speaks of offences against divers and sundry penal laws and statutes of the realm; and the enacting clause for or concerning offences committed or to be committed against any penal statute, must relate to a statute in being, for there can be no offence against a statute which does not exist.

He admitted, that affirmative statutes, introductory of new laws, might in some cases imply a negative: But he insisted that that rule of construction was not applicable to the case of the crown; for if, according to Lord Coke's opinion, 4 Inst. 172. the King is bound by *et fac.* because he is named, it will follow that he is not bound where he is not named.

He cited *the Attorney-General against Browne, Bunbury* 236.

He said, that a collection of precedents had been made for transporting wool; that 388 were laid in *Middlesex*, and only 15 in other counties.

Mr. Solicitor General.

In answer to *Stradling's case*, in *Plowd. Com.* 206. said the greatest absurdity would have been introduced by the statute of 31 Ed. 3. giving power to the Lord Chancellor and Lord Treasurer to examine the errors in judgments in this court, if the former jurisdiction had not been taken away.

He insisted that the authority given by the 5th section of 12 Car. 2. to try in the county where the offence was committed, or the party apprehended or arrested, was not nugatory, but necessary, to give justices of assize and at the quarter-sessions jurisdiction to try and determine offences against the statute; which they would not have had without those words though

though the superior courts would have had it
2 Lord Hale's *pleas of the crown* 29, 30.

Mr. Perrott added the case of the *Attorney-General* and *Rosevear*, Easter 2 Geo. 2. 1729. information on the act 5 Geo. 1. c. 18. s. 24. for one hundred pounds penalty for landing foreign salt, and on 8 Anne. c. 7. s. 17. for the treble value, for assisting in the unshipping. And the salt is laid to be imported and landed (to wit) at *Ratcliff* in the county of *Middlesex*, within the port of *London*. The defendant pleaded the general issue; and it appeared in evidence, that the salt was landed at the port of *Fowey* in *Cornwall*: But there was a verdict for the King.

Mr. Ward moved for a new trial, and insisted that the port where the salt was imported and landed was made local, and that the information, by the special description, had tied up the offence to the port or place of importation and landing.

But the court, after hearing Mr. Attorney-General, were of opinion, that an offence against an act of parliament is transitory in its nature, and may be laid in any county, if not otherwise restrained; and that the penalty of 100*l.* given by 5 Geo. 1. was but an additional penalty to the treble value given by 8 Anne; and as the information was well laid in *Middlesex* for the penalty incurred by that act, so it was for the penalty incurred by 5 Geo. 1. And unanimously denied a new trial.

But

But judgment was afterwards arrested, because it was only alledged in the information that the duties were not paid, but not said that they were not secured. *Bunbury* 286, 295.

The court took time to consider of the principal case till this term.

I was of opinion, upon consideration, that an offence against a statute was transitory in its own nature, because it was the same offence in all counties; and that the King's prerogative or right to lay his information in any county could not be taken away without express negative words, according to 4 *Inst.* 172. *Ascough's* case, *Cro. Car.* 525. and *the King and Mann*, 2 *Strange* 749.

And that the power given by the statute 12 *Car.* 2. c. 32. to inquire of and try offences against it, either in the county where they were committed, or where the party was apprehended or arrested, only related to justices of assize and the quarter-sessions; which courts would not have had jurisdiction to inquire of and try those offences, without such special words, though this, as one of the superior courts, had it: And that therefore they were not nugatory, as Mr. Starkie contended, but had their proper effect. 2 *Lord Hale's pleas of the crown* 29, 30.

Brother Legge gave no opinion, as he had not heard the argument: but my brothers *Smythe* and *Adams* concurred and agreed, that a subsequent

subsequent statute in the affirmative did not take away the King's right of laying his information in any county he pleased, and that the provision in this statute to inquire of and try offences in the county where they were committed, or where the party was apprehended or arrested, was not restrictive, but enlarging ; to give justices of assize and the quarter sessions a jurisdiction which they otherwise would not have had, though this court had it.

And upon the whole we held, that the information was properly tried in *Middlesex*; and ordered the *Postra* to be delivered to the clerk in court, for the King, with liberty to sign judgment.

TRINITY TERM,

31 Geo. 2. 1758.

The King *against* Robert Budd.

Copyhold
lands are
not liable to
be seized
upon an
outlawry,
because it
would be
prejudicial
to the lord
of the
manor.

THE defendant, *Robert Budd*, was outlawed at the suit of *Charles Handford* and *Richard Bullock*; and by an inquisition taken upon a special *capias utlagatum*, he was (among other things) found to be seized in fee,

fee, according to the custom of the manor of *Bishops Sutton* in the county of *Southampton*, of a messuage and lands; and also seized, according to the custom of the said manor, in reversion in fee, after the death of *William Budd*, of other lands; and that the said messuage and lands were copyhold lands, held under the Bishop of *Winchester*, Lord of the said manor, and subject to several mortgages in the said inquisition specified.

The *capias utlagatum* and inquisition were transcribed into this court, and a *Venditioni exponas* was issued thereon.

Mr. *Pechell* moved, the last term, that the inquisition and *venditioni exponas* might be discharged, for the following reasons, appearing on the face of the inquisition:

First, That the messuage and lands in the inquisition were copyhold, and not liable to be seized into his majesty's hands.

Secondly, That the premisses being subject to several mortgages, no proceſs ought to have issued on the inquisition till the mortgages were discharged.

Thirdly, That the defendant's estate being an estate of inheritance, and no chattel, was not liable to be sold.

The court, on reading the transcript of the outlawry, ordered the prosecutors of it to shew cause, why the inquisition and *venditioni exponas* should

should not be discharged ; and why no further process should be awarded on the said inquisition.

Brother *Wynne* shewed cause this term against the order ; and cited *Seliard* and *Everard's* case, 1 *Leon.* 97. Where a copyholder is outlawed, the King shall have the rent of his copyhold lands, and the lord hath not any remedy for his rent ; but this is only said by *Popham* Attorney-General, *arguendo*.

Paston and *Mann*, *Hetley* 7. Serjeant *Athoue* said, that a copyhold is not forfeited by outlawry in a personal action, for the lord is not prejudiced by that ; and yet the King shall have the profits, by which the Lord is estranged from the tenement. 5 *H.* 5. 2 *new book of entries* 228. *Hilary* 4 *Jacobi*, *Rotulo* 172. C. B. in the end of the case a resolution to this purpose.

Madox's history of the exchequer 238. *Idem vicecomes respondet de exitu terrae Thomae de Stow-ersgate utlagati existentis in manu regis per unum annum et unum diem.*

Mr. *Starkie*, *contra*, insisted that the King hath no interest in the freehold lands of the outlaw, but hath only the perception of the profits as they naturally arise, without manuring the land, during his life : He can neither plow nor sow. *Plowd. Com.* 541. *Lane* 83. 1 *Lev.* 33. 2 *Jones* 100.

But that the King is not even intitled to the profits of the outlaw's copyhold, because it would prejudice the Lord. *Heydon's case*, 3 *Co. 7.*

The

The court took time to consider of this case till the 10th of June in this term; when I delivered my opinion, and made two questions.

First, Whether the King is intitled to the profits of a copyhold estate of the outlaw, and whether a *Levari* could regularly issue for them.

Secondly, Whether the *venditioni exponas* for the sale of the copyhold did regularly issue in this case?

Upon the first question, I observed, that the case of *Seliard* and *Everard* is misreported in *1 Leon.* and in answer to it, I cited *Moor* 94. *Easter* 12 of Queen *Eliz.* If there be a tenant by curtesy of a manor or tenant for life, or for years, and a copyhold coines into his hands by forfeiture or determination, and now he binds himself in a statute-merchant or staple, and after demises this copyhold again; this copyhold shall be liable to the statute, because it was once annexed to the freehold of the Lord, and bound in his hands.

But if a copyholder binds himself in a statute, it shall not be extended, for he had only an estate at will. And this diversity was agreed in the common bench, as *Hammon* reported.

But the true report of *Seliard* and *Everard's* case is in *Owen* 37. It is entered *Mich.* 30 *Eliz.* *Roll* 195. among the records in the treasurer's remembrancer's office. They being recusants convicted on 29 *Eliz.* c. 5. (which subjects

jects goods and two parts of lands to the penalties, leaving a third part for the maintenance of the offenders,) and the penalties not being paid, a commission was awarded out of this court, to inquire of their goods and lands in *Suffolk*, to levy the penalties ; and, among other lands, certain copyhold lands were seized ; and being returned, the parties came in, and pleaded that some of the lands seized were copyhold, and praycd that the Queen's hands might be removd. The Attorney-General demurred : And the question was, whether copyhold lands were within the statute of 29 Eliz. or not ?

Mr. Leonard has only reported the arguments of Serjeant *Walmley* and Mr. Attorney-General *Popham*, and what dropped from *Manwood* Chief Baron, that copyholds, though not within the words, were liable within the intent of the statute. And *Clarke* Baron thought that the Queen should not have the estate in the copyholds, but only the taking of the profits. But Mr. Justice *Owen* has reported the arguments of Serjeant *Snagg* and Mr. Attorney *Popham*, and likewise the judgment of the court. The words of the book are—But after great debate it was adjudged, that copyhold lands are not within the statute, by reason of the prejudice that may come thereby to the lord, who hath not committed any offence, and therefore shall not lose his customs or services. And this report is warranted by the record ; for it there appears, that judgment was given to remove the Queen's hands from the copyhold lands.

Copyhold

Copyhold lands are not liable to seizure on an extent. *The King against Lord Viscount Lisle*, 28th of June, in *Trin. 23d* of King James, in the King's remembrancer's office; On an extent against Sir John Dudley, Lord Viscount *Lisle*, the manor of *Wellow in Worcestershire* was seized into the hands of the crown; and the sheriff having taken the cattle of one *Margaret Hullens*, on the lands seized, under the extent, she applied to the court, alledging that the lands were copyhold, held of the Bishop of *Worcester*. Whereupon it was ordered, that the copyhold lands should be discharged of the extent, and that no further process should issue against them on the said seizure.

I have looked into the cases referred to by Serjeant Athowen, in *Hetley*; but they are not to the purpose, nor do they warrant his citation of them.

As to the passage out of *Madox's history of the Exchequer*, the lands were probably freehold, they not appearing to be copyhold.

My opinion upon the second question was, that the *venditioni exponas* was absolutely irregular, because the lands being copyhold were not liable to seizure; nor could the lands, if they had been freehold, have been sold, because the King in that case would only have been intitled to the profits.

We have only the transcript of the outlawry before us; the outlawry, *capias utlagatum*, and return, remain in the court of common pleas.

Brothers *Legge*, *Smythe*, and *Adams*, concurred in opinion with me. We therefore ordered, that no further process should be awarded for levying the rents and profits of the said copyhold premises; and we quashed and discharged the writ of *venditioni exponas* for selling the said copyhold premises, as irregularly issued; but ordered that the same should stand, as to the sale of the goods therein specified.

Richard Vincent, who, &c. *against* John De Laar.

It is discretionary in the court, according to the circumstances of each case, to grant a writ of delivery or not. Denied for tobacco stalks, and why.

INFORMATION upon a seizure of 95, 5¹5 pounds weight of tobacco stalks or stems stript from the leaf.

19th of April 1758, the goods were seized at the *Hope*, about forty miles within the port of London.

20th April, a writ of appraisement issued.

28th April, the indenture of appraisement was proclaimed in court.

2d May, the defendant entered his claim.

10th May, he gave security for costs.

27th May, the information was delivered over, grounded upon the statute 12 Geo. 1. c. 28. s. 13.

3d June, the defendant pleaded the general issue.

Mr.

Mr. Starkie moved for a writ of delivery, upon the statute 13 & 14 Car. 2. c. 11. s. 30. " And be it also enacted and ordained, by the authority aforesaid, that no writ of delivery shall be granted out of the court of exchequer, for goods seized, but upon good security ; and that for goods perishable only, or in cases where the informer shall defer or delay his coming to as speedy a trial as the course of that court will permit, and shall be thereby ordered and directed."

And an affidavit was read, that the tobacco stalks had been wetted in their passage, and were lessened in value, and would become of much less value if not manufactured before the next term. He proposed to give the security required by the statute : And insisted that both the reasons in the clause took place in the present case ; for the goods appeared to be perishable, and the cause might have been tried in the term, or at the *nisi prius* sittings after it.

Mr. Attorney-General, *contra*, insisted, that there ought to be no writ of delivery in this case ; because it would defeat the intent of 12 Geo. 1. which has directed the tobacco stalks, on condemnation, to be burnt ; and here has been no delay, to intitle the defendant to a writ of delivery.

The court was of opinion, that the clause in 13 & 14 Car. 2. was restrictive, and calculated to put a stop to a practice which had prevailed, to grant writs of delivery in all cases : and to restrain

restrain the granting of them to cases where the goods seized were perishable, or there had been a delay of prosecution; and that it was discretionary in the court, whether they would or would not grant a writ of delivery, according to the circumstances of each case. *Parker, qui tam, v. Aston, Bunb.* 21. And in the case of the *Attorney-General and Powell, Trinity 16 & 17 Geo. 2.* The court denied a writ of delivery for tobacco stalks. And so the court did in the present case.

H I L A R Y T E R M,

1 Geo. 3. 1761.

Richard Camplin, and others, *against* Thomas Bullman.

Ships taken as prize by a British man of war, are liable to the duty of 5*d.* per cent. ad valorem, charged upon goods and merchandizes by the stat.

THIS cause stands for the judgment of the court. It has been very ingeniously and learnedly argued three times by counsel on both sides. My brothers and I have separately considered of the arguments; and afterwards we met and conferred together upon them; and are unanimously agreed in the judgment which I am to deliver: And though no labour or pains have been wanting on my part, yet I am obliged

12 Car. 2. c. 4. But French made sails, belonging to a French ship taken as aforesaid, are not chargeable with the additional duty of 1*d* per ell, by 12 Ann. c. 16. and 19 Geo. 2. c. 27.

obliged to my brothers for the most material observations and reasons which I shall rely upon for the support of it.

It is an action upon the case, for money had and received by the defendant to the plaintiff's use. The defendant pleaded the general issue: And the cause was tried before me, by a special jury, at *Guildhall*. And the jury found this special verdict; (*viz.*)

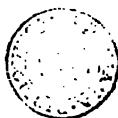
That on the first of *August* 1756, there was, and ever since has been, open war, between his late majesty and his subjects, and the *French* King and his subjects:

That the ship or vessel called *Le Cerf*, with her tackle, apparel and furniture, was the property of *French* subjects, and taken that day upon the high seas by the *Tartar* man of war; and condemned on the 23d of *September* following, by the High Court of Admiralty, as lawful prize, to *John Lockhart* Esquire, the captor thereof:

That the plaintiffs, being natural born subjects of his said late majesty, bought the said ship or vessel, together with her tackle, apparel and furniture, on the first of *May* 1757, for 1015*l.* paid to the said Mr. *Lockhart*, and she hath, ever since the purchase, been called the *Eagle* frigate.

That the plaintiffs, on the first day of *December* 1757, made oath before the defendant, being the collector of the customs of the port of *Bristol*, that the said ship or vessel had been taken

HILARY TERM, 1 Geo. 3. 1761.



taken as prize, and condemned, and *bona fide* purchased by them for 1015*l.* and applied for a certificate; and did make it appear to the defendant, that none of them were aliens; and did further take their oath, that no foreigner or alien had directly or indirectly any share or interest therein :

That the ship was duly registered, the 1st of December 1757; and the plaintiffs the same day received a certificate from the defendant, under his hand and seal, whereby the ship might for the future pass and be deemed as a ship belonging to the port of *Bristol*, and enjoy the privilege of such ship :

That the plaintiffs, on the 1st of December 1757, did equip the said ship with proper tackle, apparel and furniture, as a private ship of war, to cruize and make reprizals upon the enemy :

That at the time of fitting out the said ship, the hull of her was worth 285*l.*

That part of the tackle, apparel and furniture of the said ship, at the time of her being so fitted out, consisted of masts, cordage and sails, which belonged to her at the time of her being taken as prize, and which were on board for her use, in her said intended cruize, and were at the time last mentioned of the value of 100*l.*

That other part of the tackle, apparel and furniture of the said ship, consisted of guns, small arms and ammunition, for her use on the said

said cruize, and belonged to her at the time of her being taken as prize, and were of the value of 50*l.*

That the remaining part of the said tackle, apparel and furniture, which belonged to the said ship at the time of her being taken as prize, was of the value of 580*l.* Which sums together amount to 1015*l.*

That part of the sails on board the said ship at the time of her being fitted out as a privateer, consisted of fourteen *French*-made sails, containing 1309 ells; which sails were on board at the time of her being taken as prize, and were with the ship legally condemned, and *bona fide* sold to the plaintiffs for a valuable consideration with the ship, and were included in the said sum of 1015*l.* the purchase-money of the said ship, her tackle, apparel and furniture; and from the time of the purchase, had always continued as part of the tackle, apparel and furniture of the said ship.

That the defendant, on the 1st of December 1757, being collector of the customs as aforesaid, and the ship being preparing to depart out of the port of *Bristol*, on her intended cruize, he, before he would permit her to depart, demanded and received from the plaintiffs, as and for the customs due to his late majesty, for the ship, together with her tackle, apparel and furniture, taken and condemned as prize, the several sums following; (*viz.*)

For the hull of the said ship, being of the value of two hundred and eighty-five pounds, 13*l.* 10*s.* 9*d.*

For

For part of the tackle, apparel and furniture of the said ship, being masts, sails and cordage, of the value of one hundred pounds, 4*l.* 15*s.*

For other part of the tackle, apparel and furniture of the said ship, being guns, small arms and ammunition of the value of fifty pounds, 2*l.* 7*s.* 6*d.*

For the remaining part of the tackle, apparel and furniture of the said ship, of the value of five hundred and eighty pounds, 27*l.* 11*s.* in all 48*l.* 4*s.* 3*d.* which the defendant demanded and took of the plaintiffs, for customs, at the rate of 5*l.* per cent. *ad valorem*, upon the ship, her tackle, apparel and furniture; having first deducted an allowance out of the customs, after the rate of 5*l.* per centum.

That the defendant did likewise demand and receive 5*l.* 9*s.* 1*d.* as an additional duty of one penny per ell on 1309 ells of sail-cloth, the contents of the said fourteen French-made sails, the value whereof had been before included in the said sum of 100*l.* the value of the masts, cordage and sails on board the said ship, for her use in her intended cruize.

That the duty or custom of 5*l.* per cent. *ad valorem*, was in the year 1665, and hath ever since been, usually paid upon all foreign-built ships, taken as prize, with their tackle, apparel and furniture; and that no other or additional imposts upon goods or merchandize, created by any statutes made subsequent to the year 1665, have

have been paid upon any foreign-built ships taken as prize, or their tackle, apparel or furniture.

But whether, upon the whole matter, the defendant promised in manner and form as the plaintiffs have declared, the jury doubt.

And if the court shall be of opinion that the hull of the said ship was not, at the time when the defendant received the said 13*l.* 10*s.* 9*d.* chargeable with the said duty of 5*l. per cent. ad valorem*, then they find that the defendant did undertake and promise in manner and form as the plaintiffs have declared ; and affeſſ damages, by reaſon of the defendant's not having performed his promise in that respect, to 13*l.* 10*s.* 9*d.*

The jury refer the same doubt to the opinion of the court, as to the 4*l.* 15*s.* received for the duty of the masts, cordage and sails of the said ship.

And they refer the same doubt, as to the 2*l.* 7*s.* 6*d.* received for the duty of the guns, small arms and ammunition on board the said ship.

And they refer the same doubt, as to the 27*l.* 11*s.* received for the duty of the remaining part of the tackle, apparel and furniture on board the said ship : And they affeſſ several damages in those respects.

If the court shall be of opinion, that the said fourteen French-made sails, containing 1309 ells,

ells, were not, at the time when the defendant received the said 5*l.* 9*s.* 1*d.* chargeable with the said additional duty of one penny *per ell*, then they find that the defendant did undertake and promise in manner and form as the plaintiffs have declared, and assess damages in that respect to 5*l.* 9*s.* 1*d.*

And if the court shall be of opinion, that the defendant did undertake and promise, in all or either of the cases before mentioned, the jury assess forty shillings costs.

But if the court shall be of opinion, that the said ship, together with her tackle, apparel and furniture, was chargeable with the duty of 5*l.* *per cent.* *ad valorem*, and the said fourteen French-made sails, containing 1309 ells, were chargeable with the additional duty of one penny *per ell*, then the jury find generally for the defendant.

As the determination of the principal part of this case, respecting the duty of 5*l.* *per cent.* *ad valorem* claimed by the crown, will depend upon the statute of tunnage and poundage, 12 Car. 2. c. 4. it will be necessary to state the preamble, and some clauses of it: and particularly the rule at the end of the book of rates, that in effect is incorporated and made part of the statute.

The statute runs thus: The commons assembled in parliament reposing trust and confidence in his then majesty, for the guarding and defending of the seas against all persons that shall intend the disturbance of the intercourse of trade,

trade, and the invading of the realm, for the better defraying the necessary expences thereof, which could not otherwise be effected without great charge to his said majesty, did by and with the advice and consent of the lords in parliament assembled, give and grant unto his said majesty two subsidies, one of tunnage upon wines, by section the first, the other of poundage, by section the second, of all manner of goods and merchandize of every merchant, natural-born subject, denizen and alien, to be carried out of the realm, or any his said majesty's dominions, to the same belonging, or to be brought into the same by way of merchandize, of the value of every twenty shillings of the same goods and merchandize, according to the several and particular rates and values of the same goods and merchandizes, as the same are particularly and respectively rated and valued in the book of rates therein after mentioned and referred unto, twelve pence ; and so after that rate.

And it was enacted by section the fourth, that if any wines, goods or other merchandizes, whereof the subsidies aforesaid should be due, should at any time after be shipped or put into any boat or vessel, to the intent to be carried into parts beyond the seas, or else to be brought from parts beyond the seas into any port, place or creek of the realm, or other his said majesty's dominions, by way of merchandize, and unshipped to be laid on land, the subsidy, customs, and other duties due for the same, not paid or lawfully tendered, as therein mentioned, that then all the same wines, goods and merchandizes whatsoever, should be forfeit

to

to his said majesty; one moiety to his said majesty, and the other to him who would seize or sue for the same.

And by section the seventh, the book of rates inward and outward, is particularly enacted, (and by the rule at the end of the book of rates it is provided,) that if there should happen to be brought in or carried out of the realm, any goods liable to the payment of custom and subsidy, which either were omitted in that book, or were not then used to be brought in or carried out, or by reason of the great diversity of the value of some goods, could not be rated, that in such case, every customer and collector, for the time being, should levy the said custom and subsidy of poundage, according to the value and price of such goods, to be affirmed upon the oath of the merchant, in the presence of the customer, collector, comptroller and surveyor, or any two of them.

Before I enter upon the particular consideration of the statute of tunnage and poundage, I would premise the known distinction between statutes which grant a revenue to the King, and statutes, or clauses of statutes, which inflict a forfeiture or penalty; the former (especially where the revenue is granted for the excellent purposes mentioned in the preamble) are to be favourably and beneficially construed for the crown, but the latter are of strict construction, and are not to be extended: And so is the case of *the company of ironmongers and nailors*, 2 Jones 85. 2 Mod. 185. And this distinction was relied upon by Lord Chief Justice Treby, in his argument

argument of the case of *Courtney and Bower, Trin. 11 W. 3. C. B.* when this very statute of tunnage and poundage was under consideration.

And Lord *Hobart*, in the case of *Needler and the Bishop of Winchester, fo. 226.* is of opinion, that one chapter of an act of parliament may contain diversie acts, which may be as severall in their natures as if they were in several chapters.

Here I must observe, that the only consideration upon the statute of tunnage and poundage is, whether this ship, her tackle, apparel and furniture, are by that statute chargeable with the duty *ad valorem*, or not? For no forfeiture or penalty is in question in this cause.

I shall now apply myself to consider the clauses of the statute of tunnage and poundage: By section the second the subsidy of poundage is laid upon all manner of goods and merchandize; and these words, taken in a large sence, will comprise ships. But it was objected by the plaintiff's counsel, that the statute passed in time of peace, and that the legislature could not intend to raise a duty on the contingency of a war. But this objection received a clear answer from the defendant's counsel: That, according to *Ld. Vaughan 166.* all goods, foreign and domestick, are in their nature capable to be merchandize; that is, to be sold; and that, by the rule at the end of the book of rates already stated, any goods though not then imported or exported as merchandize, were expressly chargeable with the duty *ad valorem*, when they should be imported or exported as merchandize.

But,

But, without such express words, any new species of goods introduced into trade would have been within the meaning of the statute, according to 2 Inst. 62. upon the exposition of the statute 27 Ed. 3. c. 4. There was a new invention; and the question was, whether it should pay the duty of aulnage? And it was resolved by the judges that it should pay the subsidy by the equity, though it was not within the words of the act.

But supposing ships to be within the words goods and merchandize, yet, it is said, the statute only intended to charge ships taken as prize by privateers, and not ships taken by the King's ships; because the ships so taken belonged to the crown till Queen Anne's war, and the King could not be charged with a custom to himself; and when granted to the captors, they ought not to be liable to the duty.

They cited *Lane* 15. 2 Ro. Abr. 180. The patentee of the King; of goods of pirates seized by him, no custom shall be paid to the King; for the goods are given by the law to the King, and therefore he shall not have custom of his own goods. *Mich. 5. Ja. in Scaccario. Per Cur.*

I directed a search to be made for this case; and a diligent search has been made for it, but no footsteps of it can be found: So that it is in the dark, whether the crown had only divested itself of a particular interest, or of its whole interest, by the patent.

But

But the reasoning of Lord *Trevor*, in delivering the opinion of the judges in the exchequer chamber, in the case of *Paul and Shaw*, Hil. 8th of Queen *Anne*, 2 Salk. 622. has greatly weakened, if not overturned, the case in *Lane and Rolle*. I have a very accurate manuscript report of the case of *Paul and Shaw*, and shall cite some parts of it from thence. If (says Lord *Trevor*) the duty of prisage had remained in the crown, it must indeed have been discharged of all tunnage, in respect of the unity of the Queen's right in the wine charged, as well as in the duty payable out of it, and the absurdity of her being charged with a payment to herself; but this reason ceases, when the prisage wine is in the hands of a subject, who may pay a duty to the crown; and therefore the duty does in such case revive. If a parson leaves his glebe, it shall pay tithes, though in his own hands it was discharged by necessity. If an ecclesiastical house, who held their lands discharged of tithes by grant, or any other cause that was personal to their body, did leave their lands, they became chargeable with tithes. And the judgment of this court was reversed; and the judgment of reversal affirmed in the House of Lords, 29th January 1710.

The plaintiffs counsel argued, upon a supposition that the property of the ship in question was in the crown, from the time of the capture till the condemnation. The act 29th of his late majesty, vests the interest and property of all ships and goods taken as prize, in the captors; and I take it, that it vests such interest and property, from the time that the capture is compleat,

pleat, (subject indeed to be defeated by a sentence of the court of admiralty, and that the crown never had any property or interest in this ship.

My brother *Adams* has for this purpose furnished me with his note of the case of *Morrough and Comyns*, Easter 21st of his late majesty, *B. R.* action for money had and received to the plaintiff's use: verdict for the plaintiff; and motion for a new trial. The plaintiff claimed under *C.* who was a sailor on board the *Prince Frederick* privateer, as assignee of that sailor's share of prize money, for prizes taken by that privateer. The assignment to the plaintiff was dated in *August 1745*; and so was before the statute 20 Geo. 2. which made such assignments void; and the prizes taken were not condemned in the admiralty till *December 1745*.

The statute 17 Geo. 2. c. 34. enacts, That such ship or ships, goods, &c. so to be taken by such private owners ships or vessels (being first adjudged a lawful prize in any of his majesty's courts of admiralty,) shall wholly and intirely belong to, and be divided among, the owners of such ships, and the several persons on board such ships, in such shares as shall be agreed.

It was objected, that there appeared no title to this money in the plaintiff; for, at the time of the assignment, nothing was vested in him; he had only a mere contingency or possibility, till the condemnation in the admiralty. By the common law, whatever a privateer takes in war,

war, belongs to the King ; and though given by the said act to the captors, yet it is upon condition that it be first adjudged lawful prize in the admiralty : So that it remains in the crown till sentence is there pronounced, which is to vest it in the captors.

But Lord Chief Justice *Lee* held, that the whole meaning of the statute was, that the judge of the admiralty was to determine which were lawful prizes ; and when such declaration was made, then the captors were to be looked upon as having the sole property, from the time of the taking. The judgment of the admiralty is only necessary to declare the prizes, but does not make them more or less so. So that he did not think what was assigned to be either a contingency, or a chose in action. And my brothers *Wright*, *Denison* and *Foster* agreed. And my brother *Wright* cited *Bro. property*, pl. 38. And brother *Foster* added, that the property of the crown was wholly taken away by the statute. And a new trial was denied by the whole court.

But the most material difference between the case in *Lane* and *Rolle*, and the present case, is, that there the pirates goods were granted generally, without reservation ; but here the same act which vests the property of prizes in the captors, expressly vests it subject to the payment of customs and duties.

But it was objected, that this ship or vessel was taken by hostility, upon the high sea, and brought in by a captain of a man of war, who

was a sea officer, and no merchant ; whereas, to make this ship or vessel chargeable with the duty, she ought to be the property of a merchant, and brought into port by way of merchandize.

It is immaterial how men acquire their right in ships or goods, nor need they to be the property of merchants, or brought in by merchants ; it is sufficient they are brought in by way of merchandize. The subsidy is laid upon all manner of goods and merchandize, of every merchant, natural-born subject, denizen and alien, to be brought into this realm, &c. by way of merchandize.

The case of *Leeche, qui tam, and Howell,* Cr. Eliz. 533. The statute in Eliz. c. 19. is, that for goods brought into the realm by way of merchandize, custom shall be paid. It was objected, that it only extended to merchants : But the court resolved, that the subsidy was to be paid ; for the statute extends not only to merchants, but to all goods brought in by any man to make a benefit by the sale of them ; and so it had been often ruled before those times.

This case was agreed to be law, by the court, in *Courtney and Bowers*, already cited. The judges indeed differed as to the principal point, and three of them held wrecked goods not liable to customs ; but Lord Chief Justice *Treby* held them liable.

This ship or vessel being brought into port, and sold there for profit, must necessarily be brought

brought in by way of merchandize, and consequently be chargeable with the duty *ad valorem*.

Under this head, I think it proper to mention the case of custom in this court, *Hil. 24 Eliz. 12 Co. 17, 18.* A merchant brought 80 weight of bay salt by sea, to a haven in *England*, and out of the ship sold 20 weight, and discharged them to another ship, in which they were transported; but the said 20 weight were never actually put on shore; and for the residue, *viz.* 60, he agreed for the custom, and put them upon land: And the doubt was, upon the words of the statute 1 *Eliz. c. 11.* concerning exportation; *viz.* Sent from the wharf, key, or other place on the land; and concerning importation, take up, discharge, and lay on land; if, in this case, the said 20 weight, which were always water-borne, and never touched the land, ought to pay custom, as well inwards as outwards. And it was resolved, that in both the cases, custom ought to be paid; for the discharging out of the ship, upon the sale aforesaid, amounts in law to the putting them upon the land; for, in law, this is *infra corpus comitatus*: And if the law shall not be so taken, the King may be defrauded of all his custom. And in the case, forasmuch as no custom was paid, it was resolved, that the goods were forfeited. And if that was a sufficient importation to induce a forfeiture, *a fortiori* the bringing this ship or vessel into port, and selling her there, will be a bringing her in by way of merchandize, to intitle the crown to the duty.

By

By the act of the 30th of his late majesty, c. 18. the duty of *French* goods taken and condemned as prize, is to be paid upon their being warehoused, by the captors or their agents, and the duty *ad valorem* of the prize-goods there enumerated, is made payable, upon the oath of the captors or their agents; and why may not the duty *ad valorem* of prize-ships be settled and paid in like manner, by the vendees of the captors, as their agents?

It was further objected, by the plaintiffs counsel, that by the third section of the statute of tunnage and poundage, if any wines, goods or merchandize, shall be brought from beyond sea, into port, &c. and unshipped, the subsidy not paid, they should be forfeited: And as ships could not be unshifted, they were not intended to be charged with the duty; for the duty and remedy were co-extensive.

To which I anfwer, that this special clause ought not to restrain the operation of the preceding general clause, nor to narrow the grant of the duty upon all manner of goods and merchandize. The third clause was inserted by way of remedy, to prevent the smuggling of goods; but where a ship is in the possession of officers in the harbour, there is no danger of her getting away. Besides, by the rule at the end of the book of rates, (as has been already obſerved) all goods which might become merchandize are charged with the duty *ad valorem*; and consequently ships, when brought into port, and sold there for profit.

The

The same answer is applicable to the objection, made upon the statute 11 Geo. 1 c. 7. s. 8. That ships cannot be delivered into the King's ware-houses.

I now proceed to consider the effect of the usage, found by the verdict. It is found, that the duty or custom of *5l. per cent. ad valorem*, was in the year 1665, and hath ever since, been usually paid, upon all foreign-built ships taken as prize, with their tackle, apparel and furniture,

So that practice and enjoyment have gone along with the crown for near a century; and though such a practice will not create a duty, yet it shews the sense of all merchants and traders concerned, as well as of the custom-house officers, and is declaratory of the intent of the legislature. And they who object that it was never questioned in a court of justice, do not consider how strongly that answer recoils upon them: For not questioning it, for such a length of time, shews the matter was held unquestionable, and that every man was convinced that it would introduce great confusion to question it.

The counter-practice found by the verdict, comes next under consideration. It is found, that no other or additional imposts, created by any statutes since the year 1665, have been paid upon any foreign-built ships taken as prize, or their tackle, apparel or furniture,

It

It may be difficult to account for the mistake with certainty. Mr. *Perrott* endeavoured to account for it thus : That by the act 7 & 8 W. 3. an additional duty was laid upon *French* goods and merchandize, to commence from 28th *February* 1696 ; the consequence was, that the duty was so high, that the captors could not vend their prize-goods here.

The act of 8 & 9 W. 3. c. 24. s. 5. enacts, That the act of the preceding year should not extend to charge any goods, taken and condemned as prize, with any further duties than what they ought to have been charged withal before the making of that act.

The act 9 & 10 W. 3. c. 23. lays an additional impost on goods in general, to commence after the last day of *January* 1699.

He therefore apprehended, the reason for the officers not taking this impost on prize-ships, to be, because, as the captors had been relieved the session before from the additional duty laid on prize goods by the act of 7 & 8 W. 3. they were intended to be discharged of the impost laid by the 9 & 10 W. 3.

But my brother *Smythe* has suggested to us this more probable reason for the officers mistake in not taking the impost last mentioned on prize-ships : That the peace of *Ryswick* was made in the latter end of the year 1697 ; that that impost did not commence till the last day of *Ja-nuary*

uary 1699; and peace continued till Queen Anne's declaration of war, the 4th of May 1702; and as there could be no legal capture, and consequently no question about that impost, during the continuance of peace; so, when a further subsidy was laid by the act 3 & 4 Ann. c. 9. it was to be raised and collected by the ways and means appointed by the 9 & 10 W. 3. And the officers finding, upon their looking back, that the impost laid by 9 & 10 W. 3. had not been taken for prize-ships, &c. imagined that they were not to take the further subsidy laid by 3 & 4 Ann. And therefore the practice of not taking the additional duties seems to have been adopted from the officers reiterated mistakes. But these are rather matters of conjecture than argument.

And though this practice will not extinguish the right of the crown, yet I have reason to believe, from the opinions of several of Mr. Attorney-General's predecessors, that it is considered as such a waiver of the additional duties, that they will never be demanded. I am sure, from Mr. Attorney's honour and candour, that nothing of that sort will be done by his advice; but I have read of reigns, when it would not have been safe to have made such a discovery, though no advantage will be taken of it in these happy times.

The act of 29 Geo. 2. c. 34. s. 17. may be considered as a parliamentary exposition, that prize ships were liable to customs; for it declares and enacts, that nothing in that act shall extend to exempt any ships, goods, wares or merchandize

merchandise then taken, or which should be taken as prize, or brought or imported into this kingdom, &c. from the payment of any customs or duties, or from being subject to such restrictions and regulations to which the same were or should be liable by virtue of the laws and statutes of this realm. And this would be an absurd provision, upon the contrary supposition, that ships were exempt from duties.

But in answer to this proviso, the counsel for the plaintiffs insisted upon the statute 13 & 14 Car. 2. c. 11. s. 6. that prize-ships should enjoy the privilege of ships belonged to *England*; and the statute 19 Car. 2. c. 11. s. 2, 3, 4. which make prize-ships free for trade, requiring only an oath and certificate; and 7 & 8 W. 3. c. 22. s. 19, which gives liberty to carry goods to the plantations, and requires a special registry; But these statutes only relate to prize-ships taken by letters of marque. But they chiefly relied on the statute 20 Geo. 2. c. 45. s. 9. and the 18th section of the 29 Geo. 2. c. 34. which are more general, and include all prize-ships taken by his majesty's ships of war, as well as by privateers; for they enact, that all prize-ships and vessels which had been or should be legally condemned, should, to all intents and purposes whatsoever, be considered as *British*-built ships or vessels, and be deemed and taken as such; and should be intitled to have and enjoy all and every the same rights, liberties, privileges and advantages, in all respects whatsoever, with *British*-built ships or vessels; and should be subject and liable to all and every the rules and regulations that *British*-built ships or vessels

vessels were subject and liable to ; any law, custom or usage, to the contrary notwithstanding.

To which I answer, That the generality of expression in the 18th section, must be restrained by construction to rights or privileges different from customs and duties in the 17th section of the act ; and there are many such rights and privileges, which prize-ships might be intitled to. Whereas, if the 18th section should be construed in such a latitude as to destroy the right of the crown to the customs and duties, it would occasion the utmost inconsistency.

As to what is said in *Mollov*, book 1. c. 2. s. 25. that goods brought in as prize, by a privateer, are not subject to pay customs ; and the navigation act, 12 Car. 2. c. 18. referred to in the margin— .

The navigation-act was founded in deep policy, and calculated for the increase of our shipping and navigation, so as to make us the carriers for the world ; but I cannot find, upon the most careful perusal of it, that it has any influence upon the act of tunnage and poundage.

And the plaintiffs counsel, to shew prize-ships not liable to customs, insisted on the act 6 Ann. c. 37. s. 2. which vests the property of ships, goods and merchandize, taken in any part of America, in the captors ; (being first adjudged lawful prize in any of her majesty's courts of admiralty, and subject to the customs and duties, as if the same had been first imported to any part of Great Britain, and from thence exported,

exported, for and in respect of all such goods and merchandize;) And ships are omitted here, though mentioned before.

It is first to be observed upon this clause, that it only relates to captures in *America*. Secondly, that in an act of the same session, 6 Ann. c. 13. there is the same proviso as in the act of 29 Geo. 2. (and the latter seems to be a transcript of the former;) that nothing therein should extend to exempt any ships, goods or merchandize, taken as prize, from the payment of any customs or duties, or from being subject to such restrictions and prohibitions, to which the same were liable by the laws and statutes of the realm: Which implies, that prize-ships were understood, that very session of parliament, to be liable to customs and duties; for they could not be exempted, if they were not liable. And thirdly, the practice continued, to receive the duties for prize-ships, as well as other goods and merchandize.

The plaintiffs counsel also insisted upon the act 9 Ann. c. 27. This act, section 1. recites the act of 6 Ann. c. 37. and speaks of prize-goods and merchandizes taken in *America*; and section 4. provides, that all prize-goods and commodities imported into *Great Britain*, shall be subject to the same duties as they would have been if they had not been prize.

The same answers as have been given to 6 Anne, are applicable to this act.

As

As to the masts, cordage and sails, guns, small arms and ammunition, I shall consider them together.

It is found, That the ship was equipped with tackle, apparel and furniture, consisting of those particulars, for her use, and that they belonged to her; and as to the remaining tackle, apparel and furniture, it does not appear what they consisted of, but they are found to belong to the ship: And the practice of paying the duty *ad valorem*, found by the verdict, goes not only to the ship, but to her tackle, apparel and furniture; and all these things must be taken as part of her, and consequently be liable to the duty *ad valorem*.

Edmondson and Walker, 1 Show. 177. the sails and tackle are held to be part of the ship, and remain part of her when they are on shore.

As to *Kyntor's case*, 1 Leon. 46. The reason why ballast was held not to be part of a ship, is, because she may be laden with such merchandizes as are convenient ballast; as wheat, coals, &c. And is not applicable to this case.

But the plaintiffs counsel insisted, That the tackle, apparel and furniture, are exempted from duties by act 39 Geo. 2. c. 18. The words are, " Provided always that no duties or customs shall be demanded or taken for any prize goods, consisting of any military or ship stores, any

any thing in this act, or any other act contained, to the contrary notwithstanding."

But military or ship stores, intended to be exempted by this proviso, are cargoes of military or ship stores for the use of other ships, and not military or ship stores for the use of the ship in which they are imported; for those are, properly speaking, the ship's stores.

By the act 3 & 4 Ann. c. 10. a premium is given upon the importation of naval stores from our plantations in *America*, in the manner therein mentioned: but no premium is allowed for spare stores for the use of the ship, but only for the cargo landed.

And as these stores would not have been entitled to the premium if brought from our plantations in *America*, we think that they were not intended to be exempted by this proviso; for, as the premium is founded upon the national advantage of imported naval stores from our own plantations, so the exemption is founded upon the same national advantage of bringing in military and ship stores in time of war; and though the exemption in the 30th Geo. 2. is larger, and includes more stores than any premium is given for by the 3 & 4 Ann. yet, by construction, stores for the use of other ships ought only to be exempted, and not stores which are considered as part of the ship in which they are brought, because the latter do not come within the reason of the exemption.

It was objected by Mr. Starkie, on the last argument, that the duty *ad valorem* cannot arise upon unrated goods, without oath or affirmation of the value, in the presence of the customer, collector, comptroller or surveyor, or any two of them, according to the rule at the end of the book of rates, and the act 11 Geo. 1. c. 7. s. 7. and here, the oath of the ship's value is found to be made only before the defendant, the collector; and not pursuant to those directions, but for the purpose of her being a free *British* ship.

To which I answer, that it appears by the verdict, that the value was ascertained by the plaintiffs oath, though not in the manner directed by the rule at the end of the book of rates, and the act of 11 Geo. 1. but the special doubt of the jury is, whether the ship, her tackle, apparel and furniture, are chargeable with the duty of 5*l. per cent, ad valorem*, at the time the defendant received the several sums found by the verdict; and not whether those sums were properly charged. We do not think it necessary to fix the precise time when the duty became due, in this case; but we think it clear, that it was chargeable upon the sale of the ship, &c. for then she appears to be brought in by way of merchandize; and that was before the receipt of the money by the defendant. It is the province of the jury to try and find matters of fact; and we are not to make any other doubts than they have made, but are only to determine what they have referred to our consideration; and all other matters are to be intended and supplied.

Goodall's

Goodall's case, 5 Co. 93. Foster and Jackson's case, Hob. 55. and many other cases. And this is different from the cases cited for the plaintiffs, where the whole matter was left at large to the court; for here, though the jury doubt generally, yet they afterwards specify their particular doubts, and submit them to the consideration of the court.

It was further objected, That supposing the ship, &c. to be chargeable with the duty of *5l. per cent, ad valorem*, yet it ought to have been paid by the captors; and the defendant had no right to receive it of the plaintiffs.

But the answer to this objection is, That the only doubt of the jury is, whether the ship, &c. were chargeable with the duty, not by whom it was to be paid: And therefore, for the reasons in answer to the last objection, we must presume that the plaintiffs, upon the sale, agreed to pay the duty for the captors, or that they acted as their agents on that occasion.

And as to all these matters respecting the duty of *5l. per cent, ad valorem*, we are of opinion, that judgment ought to be given for the defendant.

The remaining question is, whether the fourteen French-made sails were chargeable with the additional duty of one penny *per ell*?

This

This depends on the acts, 12 Ann. Jeff. 1. c. 16. and the 19 Geo. 2. c. 27.

The preamble, 12 Ann. takes notice, that the making of sail-cloth in *Great Britain* is of great benefit to the nation, and that the manufacturers of it had not sufficient encouragement; and enacts, that over and above all subsidies and duties payable for foreign-made sails, or sail-cloth, &c. which shall be imported into *Great Britain* by way of merchandize, there shall be raised and paid a further duty of one penny per ell.

All that was meant by this law was, that *British* ships should be furnished with *British* sails; and so the purpose of the act would be answered: But it would be absurd to extend it to the sails of foreign ships brought in by capture, which must be supposed to be furnished with sails of the manufacture of their own country.

But this act was evaded; for it requiring foreign sails or sail-cloth to be brought in by way of merchandize, *British* ships used to go upon voyages with old worn-out sets of sails, and buy sets of sails abroad; and to put a stop to this evasion, the act 19 Geo. 2. c. 27. enacts, That every master of a ship belonging to any of his majesty's subjects, navigated with any foreign-made sails on board, shall make an entry and report of them: And that every ship built in *Great Britain*, or his majesty's plantations in *America*, on her first setting out should

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be

be furnished with a set of sails manufactured in *Great Britain*.

The plain intent of the provisions of both those acts was, that *British* ships should be furnished with *British* sails ; and if they used foreign-made sails, that the additional duty should be paid for them, but not for foreign-made sails made use of for the navigating of a foreign ship.

But it was objected by Mr. *Perrott*, that this ship, by the condemnation of her, became a *British*-built ship, navigated with foreign-made sails ; and so liable to this additional duty.

* But this is a mistake ; for there was no period of time when this ship was a *British*-built ship navigated with foreign-made sails, for the moment she became a *British* ship, the sails, as part of her, also became *British* sails.

We are therefore of opinion, that the fourteen *French*-made sails were not chargeable with the additional duty of one penny *per ell* ; and that the defendant had no right to receive *5l. 9s. 1d.* on that account ; and that judgment ought to be given for the plaintiffs, for the recovery of the money so wrongfully received by the defendant.

Hilary

H I L A R Y T E R M,

6 Geo. 3. 1766.

Robert Mitchell, who prosecutes for the King
and himself, *against* Soren Torup.

THIS is an information of seizure ; which sets forth, that the plaintiff, between the first of October and the day of exhibiting the information, seized to the use of his majesty and himself, as forfeited, a ship or vessel, called *Crokery*, with her guns, tackle and apparel, being the goods and chattels of persons unknown : For that 227 pounds weight of tea, of the value of 43*l.* and upwards, being goods of foreign growth, production or manufacture, to wit, of the growth, production or manufacture of *Africa*, *Asia* or *America*, were, with in the time aforesaid, shipped and brought in the said ship or vessel, by persons unknown, from a certain place or country in parts beyond the seas, into *Great Britain* ; the place or country in parts beyond the seas, from whence the said goods were so shipped and brought, not being the place or country of the growth, production or manufacture of the same goods, nor the port where the same goods can only, or are or

usually

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A ship im-
porting
227 pounds
weight of
tea, put on
board in
Norway by
mariners
on their
own ac-
count,
without the
privilege of
the master,
mate or
owners, is
forfeited,
by the sta-
tute 12
Car. 2. c.

⁴

usually have been, first shipped for transportation; contrary to the statute. And prays that the ship or vessel, with her guns, tackle and apparel, may remain forfeited.

The first proclamation is made; and a writ of appraisement issues, and an indenture of appraisement is returned: And on the second proclamation, the defendant comes in, claims property, and pleads, That the goods in the information mentioned, or any part thereof, were not shipped or brought, in the said ship or vessel, from any place or country in parts beyond the seas into *Great Britain*, contrary to the statute, as by the information is supposed. And issue is joined by Mr. Attorney-General.

The cause was tried before my brother *Smythe*. And the jury found this special verdict: That 221 pounds weight of tea, of the value of 49*l. 1s.* being of the growth or production of *Asia*, were, within the time mentioned in the information, shipped in the said ship or vessel, called the *Crokery*, at *Crokery* in *Norway*, being a place or country in parts beyond the seas; and not being the place or country of the growth or production of the said goods, nor the port where they could only, or were at the time of exhibiting the said information, or usually had been, first shipped for transportation.

And the jury further find, That the goods were put on board the said ship or vessel, at *Crokery* aforesaid, by the mariners belonging to the said ship or vessel, in order to be smuggled into, and landed in *England*, upon their own account

account only; and were, before the seizure of the said ship or vessel, and within the time mentioned in the information, imported and brought in the said ship or vessel from *Crokery* aforesaid, into *Great Britain*, with an intent to be landed there as aforesaid; but without the knowledge, privity or consent of the master, mate or owners, of the said ship or vessel.

And the jury further find, That the ship or vessel was of the burthen of one hundred tons, and during her voyage from *Crokery* aforesaid to *Great Britain*, was principally loaded with deals, but was also loaded with the said 221 pounds weight of tea; and that the company of the said ship or vessel, during the said voyage, consisted of the master, mate, nine men and two boys, and no other person.

The jury then find the seizure of the ship, with her guns, tackle and apparel, as laid in the information.

But whether, upon the whole matter so found, the said 221 pounds weight of tea were shipped and brought in the said ship or vessel from any place or country in parts beyond the seas into *Great Britain*, contrary to the statute, as supposed by the information, the jury doubt: And if the court shall be of opinion that they were shipped and brought in the said ship or vessel from parts beyond the seas into *Great Britain*, contrary to the statute, then the jury find for the plaintiff: if not, they find for the defendant.

This

This case has been very learnedly argued by Mr. Attorney and Solicitor-General for the plaintiff, and by my brother *Glynne* and Mr. *Dunning* for the defendant.

My brothers and I have considered of the arguments, and have since conferred together; and I am greatly obliged to them for the assistance they have given me in the judgment I am now to deliver by their direction.

This information is founded upon the fourth clause of the navigation act, 12 of King *Charles* the 2d.

The general question is, whether, from the facts found by this special verdict, a forfeiture of this ship is incurred, or not? And this will depend upon the true construction of the fourth clause of the act: And, in order to see what is the true construction of it:—

First, I shall shortly state the title and preamble, and the three first clauses of the act, and the fourth clause at large; and then consider the words of it, and the reason of its being so penned.

Secondly, I shall consider the objections which have been made by the defendant's counsel, and the answers that have been offered on the part of the plaintiff; which will involve something of the nature of this proceeding, and the course of precedents of informations upon this clause of the act.

Thirdly,

Thirdly, I shall consider the authorities upon this clause of the act.

The title and preamble declare the intent of the act to be, for the increase of shipping, and the encouragement of the navigation of this nation.

By the first clause, no goods are to be imported into, or exported out of, any of the *English* plantations in *Asia*, *Africa* or *America*, but in *English* or *Irish* vessels, or in vessels of that country, and the master and three-fourths of the mariners are to be *English*, under the penalty of the forfeiture of the goods and ship. And all admirals and commanders of ships of war are authorised and required to seize and bring in as prize all such ships and vessels as shall have offended contrary hereunto.

By the second clause, no alien is to be a merchant or factor in any of those plantations, under pain of forfeiture of all his goods and chattels, or which are in his possession.

By the third clause, no goods of the growth, production or manufacture of *Africa*, *Asia* or *America*, are to be imported into *England*, &c. but in *English* or *Irish* vessels, or in vessels of that country, and the master and three-fourths of the mariners are to be *English*, under the penalty of the forfeiture of the goods and ship.

By

By the fourth clause, (more particularly to be considered,) no goods or commodities that are of foreign growth, production or manufacture, and which are to be brought into *England, Ireland, Wales, the islands of Guernsey, Jersey, or town of Berwick upon Tweed*, in English-built shipping, or other shipping belonging to some of the aforesaid places, and navigated by English mariners as aforesaid, shall be shipt or brought from any other place or places, country or countries, but only from those of the said growth, production or manufacture, or from those ports where the said goods and commodities, can only, or are or usually have been first shipt for transportation, or from none other places or countries ; under the penalty of the forfeiture of all such the aforesaid goods as shall be imported from any other place or country, contrary to the true intent and meaning hereof, as also of the ship in which they were imported, with all her guns, furniture, ammunition, tackle and apparel ; one moiety to the King, and the other to the informer.

These words are (as Mr. Attorney truly observed in his argument) negative, absolute, and prohibitory ; they not only operate upon the goods, but equally on the ship ; and there is not a syllable that hints at the privity or consent of the master, mate or owners.

The reason of penning this clause in these strong terms, is to prevent as much as possible it's being evaded, for if the privity or consent of the master, mate or owners, had been made necessary

necessary to the forfeiture, it would have opened a door for perpetual evasion, and the provisions of this excellent act for the increase of the navigation would have been defeated.

And yet every man is bound by the laws of the country to and from which he trades, and must at his peril take notice of them.

In expounding acts of parliament, where words are express, plain and clear, the words ought to be understood according to their genuine and natural signification and import, unless by such exposition a contradiction or inconsistency would arise in the act by reason of some subsequent clause, from whence it might be inferred the intent of the parliament was otherwise; and this holds with respect to penal, as well as other acts. *Moore and Hufsey, Hob. 93, 97.*

But here the subsequent clauses are so far from shewing a contrary intent, that they enforce the natural import of the words of the fourth clause.

For, by *sect. 12.* the commodities of the *streights* and *Levant*, imported in *English-built* shipping from the usual places, are excepted.

So, by *sect. 13.* the importation of *East India* goods in *English-built* vessels, from the usual places, is excepted.

And

And by *sect. 14.* Englishmen may import in English vessels, &c. from Spain and Portugal, goods of their plantations.

And the known rule, of *exceptio probat regulam in non exceptis*, properly takes place here.

This act was several times under the consideration of the legislature in the last reign.

By the 14 Geo. 2. c. 36. The *Russia* company may import *Russian* commodities, from any port of *Russia*.

By the 25 Geo. 2. c. 32. Gum Senega is allowed to be imported from any part of Europe.

By the 17 Geo. 2. c. 36. Certain enumerated goods are allowed to be imported in *British*-built shipping, the property of foreigners.

And yet there is no relaxation in any of these acts, to make the privity or consent of the master, mate or owners, necessary to a forfeiture; but particular sorts of goods are only allowed to be imported from different places than they could be before the passing of these acts.

Secondly, I now proceed to consider the objections which have been made by the defendant's counsel, and the answers thereto; together with the nature of this proceeding, and the

the precedents of informations upon this clause of the act.

For it is objected, that the penalty or forfeiture, imposed by the fourth clause of the act, is only applicable to cases where there is some crime or guilt; but no crime or guilt can be imputed to the master, mate or owners, without their privity, the mariners being the only criminal or guilty persons, and therefore they ought to be the only sufferers.

To which I answer, That though penalty or forfeiture, generally speaking, is the consequence of some crime or guilt, yet neither penalty nor forfeiture necessarily imply the one or the other, though punishment always does.

To shew this, several instances were mentioned upon the arguments: As where a murder is committed with the sword of an innocent man, the sword is forfeited; the like of all deodands. So, by the 4th of *William and Mary*, c. 8. the horses of innocent owners, upon which robberies are committed, are forfeited. And by the 8th of *Anne*. c. 7. s. 17. the vessels, boats, horses and other cattle, and carriages, made use of in the landing or removing, carriage or conveyance of any uncustomed or prohibited goods, are forfeited. And there are several other acts to the same purpose, which I shall barely refer to. 13 & 14 Car. 2. c. 11. s. 7. 1 W. & M. c. 32. s. 2. 7 & 8 W. 3. c. 28. s. 8. 8 Ann. c. 13. s. 16. 10 Geo. 1. c. 10. s. 27. 12 Geo. 2. c. 24. s. 11. 24 Geo. 2. c. 41. s. 22.

But

But by the 4th clause of the navigation act, the forfeiture is not upon the person, but upon the ship ; nor is this a proceeding in *personam*, but in *rem*, for the condemnation of the ship as forfeited.

And I am credibly informed, that the informations upon this clause of the act have been in this form from the time of passing it, which shews how this law has been understood ; and as no privity has been laid in them, it was not necessary to prove more than was laid. And though I agree that the jury are not concluded from finding the truth of the fact where it is within the issue ; yet here the jury have found the issue for the plaintiff : And their finding the importation to be without the privity of the master, mate or owners, is nugatory and void, because it is not comprised in the issue. *Bro. verdict, pl. 78. 2 Ro. Abr. 707. pl. 37. Hob. 53. Lord Raym. 860, 865. Tonkin and Crocker.*

Mr. Attorney insisted, that the ship, in this case was to be considered as the offender ; and this is countenanced by the words in the latter part of the first clause ; “ all such ships or vessels as shall have offended contrary hereunto.”

But from the case of *Sheppard and Gofnold*, in *Lord Vaughan* 159. cited by brother *Glynn*, I think no great stress is to be laid upon this observation.

The defendant's counsel cited the statute of 38 Ed. 3. c. 8. “ Whereas the ships of diverse people

people of the realm, be arrested and holden forfeit, because of a little thing put into their ship not customed, whereof the owners of the ship be ignorant: It is accorded and assented, that no owner shall lose his ship for such a small thing put within his ship, not customed, without his knowledge."

But the navigation-act is subsequent; and an express prohibition, without any limitation or restriction; and has altered the law, by excluding privity, as the most effectual means to prevent the mischief.

And ships are liable to forfeiture for much less quantities.

By the 9 Geo. 2. c. 35. (for hovering act,) having six pounds weight of tea on board, the tea is forfeited.

And by the 3 Geo. 3. c. 22. s. 5. The ship or vessel is forfeited for having that small quantity of tea on board.

By the 5 Geo. 3. c. 43. Ships or vessels having 20 pounds weight of coffee on board are forfeited.

But it is said, that at this rate, let the quantity of tea be never so small, the ship will be forfeited; which would be very hard: but if it be such a small quantity that it could not be discovered by reasonable care and search, I should think a case so circumstanced proper for the consideration

deration of the jury, and that they neither would nor ought, in such a favourable case, to find a forfeiture of the ship ; for, *de minimis non curat lex.*

The defendant's counsel then relied upon the statute 27 Ed. 3. c. 19. " No merchant or other, of what condition that he be, shall lose or forfeit his goods or merchandizes, for the trespass and forfeiture of his servant ; unless he do it by the commandment or procurement of his master, or that he shall have offended in the office in which his master hath set him, or in other manner that the master be holden to answer for the deed of his servant by the law merchant, as elsewhere is used."

This statute seems to be only declaratory of the common law, and admits of the same answer as was given to the statute of 38 Ed. 3. That the navigation-act is subsequent to it.

But the owners of ships are to take care what master they employ, and the master what mariners ; and here negligence is plainly imputable to the master ; for he is to report the cargo of the ship, and if he had searched and examined the ship with proper care, according to his duty, he would have found the tea, as the officers did, and so might have prevented the forfeiture.

As to the hardship of the case : The master is answerable to the owners for the damage they suffer by his default, or by the unlawful act of the mariners, because he employs them ; and the

the mariners are answerable to the master for any damage he suffers by their doing an act prohibited by law, or that is a breach of trust in them ; though it must be confessed, that but little benefit can be expected from this remedy against the mariners. *Morse v. Slue*, 1 *Vent.* 190, 238. *Hussey v. Pusey*, 1 *Sid.* 298. *Hern. v. Nicholls*, 1 *Salk.* 289. *Idle v. Vanneck, Bunbury* 230.

This brings me to the authorities on this clause of the act.

The Chief Barons, upon trials at *Nisi Prius*, have been uniformly of opinion, that the privity of the master was not necessary to create a forfeiture upon this act of parliament. Chief Baron *Mountague*, in *Foster and Phillips*, in 1722, Chief Baron *Gilbert*, in *Gatehouse and Aycock*, in *Trinity* 1725, Chief Baron *Pengelly*, in *Idle and Vanneck*, already cited out of *Bunbury*, and the other Barons, agreed with him upon a motion for a new trial : And it is observable, that the statutes of 27th and 38th of *Ed. 3.* were cited upon that occasion.

Mr. *Dunning*, in his argument, supposed that the opinion of the Barons, in *Idle* and *Vanneck*, was not given upon the want of privity in the master or owners, but upon the affidavit of a sailor, swearing to some other matter, in order to obtain a new trial. But the affidavit upon which the motion for a new trial was grounded, was the affidavit of *Thomas Allison* ; wherein he swore, that he brought the goods on board privately, without the master's or owner's privity, and that he purposely kept out of the way,
to

to prevent being subpoenaed as a witness on the trial, so that the point was the same as in the present case, and the Barons were of opinion that the ship was forfeited: And its coming before the court upon a motion, and not upon a special verdict, makes no difference as to the justice of the determination, but only as to the solemnity of it.

But, as I find a note at the end of the case of *Idle* and *Vanneck*, (where Mr. Bunbury reports, that in the case of *Greeby, qui tam, v. Palmer*, Feb. 13, 1733, Chief Baron Reynolds put this point upon this distinction, whether goods so brought were part or not part of the cargo; and therefore, if mariners or passengers privately bring over a small parcel of goods, that is not to be looked upon as part of the cargo; and it would be hard that the ship should be forfeited for that;) I thought it my duty not to pass it over in silence, nor to dissemble the force of it.

I presume, that his immediate successor, Chief Baron *Comyns*, did not alter his opinion; as he was one of the Barons when the case of *Idle* and *Vanneck* was determined, and concurred in opinion with the other barons. What the opinion of Chief Baron *Probyn* was, I know not; but supposing, for argument sake, that he adopted Chief Baron *Reynold's* notion, it will not apply to the present case; for I think the quantity found by this verdict is not so small as to excuse the forfeiture of the ship.

For these reasons, and upon these authorities, we are all of opinion, that judgment ought to be given for the plaintiff.

Hilary

The King *against* Henry Muilman and Robert Macky, merchants.

[As yet common busines of *Hilary* term in the 6th year of King George the Third.]

London and Middlesex. { BE it remembered, That in the roll Two justices of the peace, after the expiration of the statute 32 Geo. 2. c. 25. may take a resumption of the appearance of a person charged with wilfully sinking a ship upon the high seas, contrary to the statute 4 Geo. 1. c. 11. at the next session of admiralty; and such recognition may be extreated into this court.

of estreats remaining in the custody of the clerk of the estreats of the Court of Exchequer, is found as followeth, in these words, (to wit) admiralty of *England*—An estreat of a recognizance forfeited at the session of Oyer and Terminer and gaol-delivery cognizance for the appearance of our Sovereign Lord the King, holden for the jurisdiction of the admiralty of *England*, a person charged at *Justice-Hall* in the *Old Bayley*, in the parish of *St. Sepulchre*, in the ward of *Farringdon without*, in *London*, on *Thursday* the twenty-first day of *June*, in the fourth year of the reign of our Sovereign Lord *George the third*, King of *Great Britain, &c.* before Sir *Thomas Salisbury*, knight, and doctor of laws, lieutenant and commissary of the high court of admiralty of *England*, and judge and president of the said court; Sir *Henry Gould*, Knight, one of the justices of the court of common pleas of our said Lord the King; *George Perrott*, Esquire, one of the barons of the court of Exchequer; and other justices, &c.

Of *Henry Muilman* of *London*, merchant, one of the pledges of *Robert Boyd*, because he had him not as above to answer what should be objected against him on his majesty's behalf, as by a certain recognizance he undertook — — —

Of *Robert Macky* of *London*, merchant, the other of the pledges of the said *Robert Boyd*, for the like: — — —

Sum Total £ 2000 0 0 — — —

R

And

And now, (to wit) on the 28th day of November, in this same term, came here into court, *Henry Muilman* of London, merchant, and *Robert Macky* of London, merchant, in the said roll of estreats named, by *John Perrott* their attorney, and pray oyer of the said roll of estreats; which being read, and by them the said *Henry Muilman* and *Robert Macky* heard and fully understood: they the said *Henry Muilman* and *Robert Macky* also pray oyer of the certificate filed of record in the said court here, of the said estreat; (and it is read to them as follows, (to wit) To the Right Honourable Sir *Thomas Parker*, Knight, Lord Chief Baron of his Majesty's Court of Exchequer, and the rest of the Barons of that Honourable Court. Admiralty of England—These are to certify, that at the sessions within specified, the within named *Henry Muilman* and *Robert Macky* stood bound by the recognizance within mentioned, conditioned for the personal appearance of the within named *Robert Boyd* at the same session, to answer what should be objected against him on suspicion of having feloniously and wilfully cast away or otherwise destroyed the ship *Brilliant*, of which he was captain, with intent to prejudice the underwriters of the policy of insurance made thereon, contrary to the statute, &c. At which same session within mentioned, the said *Robert Boyd* did not appear pursuant to the condition of the said recognizance, whereby the same became forfeited, and was accordingly by the court ordered to be estreated into this Honourable court. And these are further to certify, that at the same session within specified, the said *Robert Boyd* was indicted for feloniously and wilfully

wilfully casting away and destroying, and directing and procuring to be cast away and destroyed, a ship or vessel called the *Brilliant*, whereof he was master, with intent to prejudice diverse persons who had severally underwritten a policy of insurance thereon, against the form of the statute, in such case made and provided; and that the said *Robert Boyd* hath not yet been arraigned, or taken his trial, upon the said indictment. Dated this twenty-fourth day of *November*, one thousand seven hundred and sixty-four. *T. Fisher*, clerk of arraigns for the jurisdiction of the admiralty of *England*) Which being also read, and by them the said *Henry Muilman* and *Robert Macky* heard and fully understood, they the said *Henry Muilman* and *Robert Macky* say, that the said several sums of one thousand pounds and one thousand pounds, ought not to be made or levied on their respective goods or chattels, lands or tene- ments, to the use of our said Lord the King; because they say, that the war which was de- pending between the Lord *George the Second*, late King of *Great Britain*, and the *French King*, at the time of making of a certain act of parlia- ment, made in the parliament of his said late majesty, at a session thereof holden at *Westmin- ster* in the county of *Middlesex*, in the thirty- second year of his reign, (intituled an act to ex- plain and amend an act made in the twenty- ninth year of his then present majesty's reign, intituled an act for the encouragement of sea- men, and more speedy and effectually manning his majesty's navy, and for the better preven- tion of piracies and robberies by crews of pri- vate ships of war) ended on the twenty-second day of *March*, in the third year of the reign of

our Sovereign Lord the present King. And the said *Henry Muilman* and *Robert Macky* further say, that after the end of the said war, that is to say, on the twenty-third day of *May*, in the said third year of the reign of our said present Lord the King, at the parish of *St. Paul Covent-Garden*, in the county of *Middlesex*, aforesaid the said recognizance, so estreated into the court here as aforesaid, was entered into and acknowledged by the said *Henry Muilman* and *Robert Macky*, before and taken by Sir *John Fielding*, Knight, and *John Spinnage*, Esquire, then and there being justices, and each of them being a justice of our said Lord the present King, affigned to keep the peace of our said Lord the King in and for the said county of *Middlesex*, and also to hear and determine diverse felonies, trespasses and other misdemeanors, committed within the said county; upon condition that *Robert Boyd*, in the said estreat named, should personally appear at the next sessions of oyer and terminer and gaol-delivery of *Newgate*, at *Justice-Hall* in the *Old Bailey*, within the jurisdiction of the admiralty of *England*, then and there to answer what should be objected against him, upon suspicion of having feloniously and wilfully cast away or otherwise destroyed the ship *Brilliant*, of which he was captain, with intent to prejudice the underwriters of the policy of insurance made thereon, contrary to the statute, and should not depart the court without leave, then the said recognizance to be void, or else to remain in full force; as by the said recognizance, returned to and now remaining of record in the court of oyer and terminer and gaol-delivery aforesaid, fully appears. And the said *Henry Muilman* and *Robert*

Robert Macky further say, that the said recognizance was then and there so entered into and acknowledged before and taken by the said Sir *John Fielding* and *John Spinnage* as aforesaid, as such justices as aforesaid ; and that the same was not entered into and acknowledged before or taken by the said Sir *John Fielding* and *John Spinnage*, or either of them, in any other character or capacity whatsoever ; and that the said supposed offence in the said condition of the said recognizance mentioned, was committed upon the high seas, within the jurisdiction of the admiralty of *England*, and not within the body of any county within this realm : Wherefore the said Sir *John Fielding* and *John Spinnage* had not, nor had either of them, any power or authority to take the said recognizance, and the same is void in law. All which matters and things the said *Henry Muilman* and *Robert Macky* are ready to verify and prove, as the court here shall consider. Wherefore they pray judgment, and that they may be respectively discharged and dismissed by the court here, as to the said two sums of one thousand pounds and one thousand pounds charged upon them as aforesaid, and of and from every part thereof, as against our said Lord the now King, his heirs and successors. And because the court would consider of the premises before, &c. a day is given to the said *Henry Muilman* and *Robert Macky* (now here pleading) in which state they remain until fifteen days of St. Hilary next, to hear and do those things which, &c.

At which day came here the said *Henry Muilman* and *Robert Macky*, by their attorney aforesaid,

said, and pray judgment, as before. And the honourable *Charles Yorke*, Attorney-General of our Lord the King, who prosecuteth for our said Lord the King in this behalf, being present here in court the same day in his proper person for our said Lord the King, says, That the said *Henry Muilman* and *Robert Macky* ought not, by reason of any thing in the said plea alledged, to be discharged and dismissed by the court here, as to the premisses ; because, he says, that the said plea, in manner and form above pleaded, and the matter in the same contained, are insufficient in law to discharge the said *Henry Muilman* and *Robert Macky* of the said several sums of one thousand pounds and one thousand pounds, to be made or levied on their said respective goods or chattels, lands or tenements, to the use of our said Lord the King ; and this the said Attorney-General of our said Lord the King is ready to verify : Wherefore, for want of a sufficient plea in this behalf, the said Attorney General of our said Lord the King prays judgment ; and that the said several sums of one thousand pounds and one thousand pounds, to be made or levied on their said respective goods or chattels, lands or tenements, to the use of our said Lord the King, may be made.

And now (to wit) on the fifth day of *February*, in this said term, the said *Henry Muilman* and *Robert Macky* came into court by their said attorney, and say, that their said plea, in manner and form above pleaded, and the matter in the same contained, are sufficient in law to discharge them the said *Henry Muilman* and *Robert Macky* of the said several sums of one thousand pounds and one thousand pounds, from being made

made or levied on their said respective goods, chattels, lands or tenements, to the use of our said Lord the King ; which said plea, and the matter therein contained, they the said *Henry Muilman* and *Robert Macky* are ready to verify and prove, as the court shall direct. And because the said Attorney-General of our said Lord the King hath not answered the said plea, nor in any manner denied the same, they the said *Henry Muilman* and *Robert Macky*, as before, pray judgment ; and that they may be respectively discharged and dismissed by the court here, as to the said two sums of one thousand pounds and one thousand pounds.

Hilary 7 of King George 3, 1767.

I delivered the opinion of the court this term, And to make the case upon the pleadings intelligible, it will be proper to state two or three clauses in the act of 32 Geo. 2. c. 25. which whilst in force was a general law, and therefore only referred to by the plea.

Power is given by it, not only to one or more commissioners in the commission of oyer and terminer for trying offences within the jurisdiction of the admiralty, but also for one or more justices of any county to take informations, not only for piracy, felony or robbery, committed on the sea, but in any haven where the admiral hath jurisdiction ; and by warrant to cause the person accused to be apprehended and committed to the county-gaol ; and to oblige the prosecutor and witnessess to enter into a recognizance .

a recognizance in a sufficient penalty, for their appearing at the next session of oyer and terminer, and gaol-delivery, to be held for the jurisdiction of the admiralty; and, on refusal, to commit: And informations and recognizances are to be transmitted to the register of the admiralty. Provided, that the act should continue in force during the then present war, and no longer.

It is observable, that the powers given to the commissioners and justices of the peace by these clauses, are the same, without the least difference.

The plea supposes all the powers of justices of the peace in cases of this nature to be derived from this act; it is therefore to be seen, whether that supposition is well grounded, or not.

For it is objected, that this act being expired at the time of taking the recognizance, Sir John Fielding and Mr. Spinnage had no power to take it, because it is for an offence committed on the high sea, and not within the body of any county: And it was resembled to the case of piracy, which is an offence only by the civil law, of which the common law takes no cognizance; for it could not be tried, being out of all towns and counties. 3 Inst. 112.

I answer—It is not only lawful, but the duty of every subject to apprehend a felon, and take him to a justice of the peace; who is to examine, bail, or to commit him; in order to preserve

serve the peace of the kingdom, and to super-
presa felons. 2 *Lord Hale's Pleas of the Crown*
76, 77, 108, 109.

But it is said, that this being a felony by the civil law only, the suspected felon ought to have been taken before a commissioner; and the commissioners are very numerous, there are four hundred of them in the maritime counties. But what if he had been taken in an inland county, is he to be turned loose again, to escape public justice? No. But if taken in a maritime county, even for piracy, he may be taken before a justice of the peace for the county, and committed to the common gaol.

13 Co. 53. is express. *Butler* and others, upon the high sea, robbed diverse of the Queen's subjects of their goods, and brought them into *Norfolk*; and were there apprehended, and brought before *Coke*, (then a justice of the peace for that county, afterwards Lord Coke,) who was of opinion, that it was not a felony punishable by the common law, because the original act of taking was not an offence of which the common law takes cognizance: and bringing the goods into a county could not make it a felony punishable by law; and yet he committed them to gaol till the next assizes. And Lord Chief Justice *Wray*, and *Periam*, the justices of assize, agreed in opinion with Lord Coke. And what did they do? Not discharge them; but committed them to Sir *Robert Southwell*, the Vice-Admiral of the said counties. And if the justice of the peace and justices of assize could commit, why could they not bail in a bailable case?

Justices

Justices of the peace cannot try treason, and yet they may take examinations, &c. for the discovery of it. 1 *Lord Hale's Pleas of the Crown* 350, 372. 2 *Hale's Pleas of the Crown* 44.

So, the Lord Chancellor may commit or bail in criminal cases, though he has no power to try. 2 *Hale's Pleas of the Crown* 147.

So, if A. commit a felony in the county of B. and goes into the county of C. a justice of the peace of the county of C. may take informations, and commit him to the common gaol of C. 2 *Lord Hale's Pleas of the Crown* 51.

And regularly, all courts and persons that have judicial power, by the common law or by act of parliament, for the conservation of the peace, have power to grant warrants for arresting of felons; but such as are simply ministerial have no such jurisdiction, but must do their office either alone, or with others called to their assistance. 2 *Hale's Pleas of the Crown* 105.

And the act of 24 Geo. 2. c. 55. only gives a further remedy to what the justices had at common law.

And all these powers, whether they relate to civil or common law offences, are founded in necessity, for the better preservation of the peace, and suppression of felonies.

But

But the offence of a captain, master, mariners, or other officers, wilfully casting away, burning or otherwise destroying any ship, to the prejudice of the owner, or any merchant that had loaded goods on her, is made capital,
1 Ann. Jeff. 2. c. 9.

The act 4 Geo. 1. c. 12. extends the offence to captains or masters who commit it to the prejudice of the underwriter of any policy; and the offenders are to suffer death.

The act of 11 Geo. 1. c. 29. makes the offence for which this recognizance is taken, felony without the benefit of clergy: And if committed within the body of the county, it is to be tried in such county as felonies committed within the body of the county are to be tried; if on the high sea, then to be tried and determined before such court, and in such manner, as is directed by the statute of 28 Hen 8.

The offence, therefore, for which this recognizance is taken, is made capital by act of parliament; and all the same powers of justices of the peace immediately and of course attached in them over this new created felony as they had over other felonies.

But it is objected, that justices of the peace had no power to bail in this case. Lord Hale, in vol. 2. p. 137, 138. refers to the statute of 1 Rich. 3. which gave power to one justice of the peace to bail, in felony; the 3d of Hen. 7. c. 3. restrained it to two justices; and the 1 & 2 P. & M. requires two justices, one of the quo-rum,

rum, to be present at the bailing, and to certify it in writing at the next gaol-delivery: And by 2 & 3 P. & M. examinations and informations are to be transmitted to the next gaol-delivery, where the trial of the felony shall be. And that these powers relate only to felonies committed within the body of some county, and the recognizances are to be certified to the next gaol-delivery, within the jurisdiction of the justices; but that these powers do not relate to felonies committed on the high seas, nor are recognizances warranted to be taken for such offences by any of these statutes, or to be certified to any court of oyer and terminer or gaol-delivery to be holden for the jurisdiction of the admiralty.

I answer, that these statutes are only directory.

Dalton's Justice, c. 90. says, "That for all treasons and other offences against the peace, the justices of the peace may cause the offenders to be apprehended, take examinations, and commit to gaol; and bind over such persons as can prove any thing material, to give evidence before the Lords of the Council, King's-Bench, gaol-delivery, or elsewhere."

The law indeed is since altered as to the Lords of the Council.

So, if a felony be committed in one county, and the felon escapes into another, the justice of the county to which he escaped may take informations,

informations, and grant his warrant against him ; but if he is apprehended and bailed, the informations and recognizance must be certified to the gaol-delivery where the felony was committed.

It is laid down in 2 Hawk. 105. that the bailing of persons comes under the cognizance of justices of the peace, as conservators of the peace ; and they are to take surety to appear before the proper court.

And by parity of reason, the recognizance for this offence is properly taken for *Boyd's* appearance at the then next session of oyer and terminer and gaol delivery to be holden for the jurisdiction of the admiralty.

And the act of the 32 G. 2. only enlarged the power of the justices, and gave one justice a power of bailing where two had it before, and so restored the power of the 1st of *Richard* the Third ; but upon the expiration of it, the power was again restrained to two justices, according to the 1st of *Philip and Mary* : And therefore this recognizance is taken by two justices.

It was then objected, that the recognizance is conditioned to appear at the then next session of oyer and terminer and gaol-delivery of *Newgate*, at *Justice-Hall* in the *Old Bailey*, within the jurisdiction of the admiralty of *England*, and no such commission has been for several years granted, (though it was admitted that the words gaol-delivery were in the old commissions ;)

sions; much less ought the following words to have been added, “ at *Justice-Hall* in the *Old Bailey*, within the jurisdiction of the admiralty of *England*. ”

Lord *Hale*, in his 2d vol. p. 18. expresses himself thus: But note well, “ That besides this commission founded upon the statute of 28 Hen. 8. which extendeth only to treason, murder, robbery and confederacies; there is, and for above these hundred years last past there hath been, in the same commission, a common law commission of oyer and terminer, and also a commission of the peace and gaol-delivery, for all offences against any penal laws, *super mare*, *vel infra fluxum maris*; and also of all treasons, murders, felonies, &c. *super mare*, *vel aliquo rivo, portu, aqua dulci creca, seu infra fluxum maris ad plenitudinem maris, a quibuscunque primis pontibus versus mare, et super littus maris, &c. secundum stylum et consuetudinem regni Angliae et curiae Admiraltatis*: And limits the county of their session and inquiry.”

And by the act of 32 Geo. 2. Recognizances for offences triable in the admiralty, are directed to be, for appearing at the next session of oyer and terminer and gaol-delivery; which, though expired, shews the sense of the legislature, that it then was a commission of oyer and terminer and gaol-delivery.

But the *estreat* itself is a clear answer to every part of the objection. “ Admiralty of *England*—An *estreat* of *recognizance* forfeited at the session

fection of oyer and terminer and goal-delivery
of our sovereign Lord the King, holden for the
jurisdiction of the admiralty of *England*, at
Justice-Hall in the *Old-Bailey*, &c.

We are unanimously of opinion, that this re-
cognizance is well taken; and that it is for-
feited, and properly estreated; and that judg-
ment must be given for the King.

APPENDIX.



A P P E N D I X:

CONTAINING

C A S E S

UPON THE

S A M E S U B J E C T

IN

F O R M E R R E I G N S.

S



MICHAELMAS TERM,

30 Charles 2. 1678.

Tuesday 29th of October.

Ewin's Case.

JOLLY, receiver of the assessments in the county of Huntingdon and other places, was bound to the King by divers bonds, and indebted to him on his account. *Ewin*, a goldsmith of London, was indebted to *Jolly* by simple-contract, and *Lindsay* indebted to *Ewin* by simple-contract; and upon oath made, according to the rules in 1639, an extent issued against *Jolly*, which found *Ewin's* debt; and it was admitted by the court, upon a motion, that *Lindsay's* debt to *Ewin* shall be found and seized into the King's hands. And it was said to be the practice, that debts by specialty shall be found to the third degree, as this was; but the doubt was, if debts by simple-contract may. And held by the court, that they may, within those rules, upon oaths and motions, but not beyond the third degree.

S 2

Tuesday,

Tuesday, 26th of November 1678.

Jolly indebted to the King, as receiver of taxes, *Ewin* and *Norrington* indebted to *Jolly*, and *Lindsay* indebted to *Ewin* and *Norrington*; upon affidavit, and motion in court, for *Ewin* and *Norrington*, this debt of *Lindsay* to them was seized in aid, being only the third degree; And, by the court, held to be within the rules for debts in aid. And upon an extent against *Lindsay*, leases and goods seized; and, upon *venditioni exponas*, sold; and the money, upon motion, this day, by order of court, paid by the sheriff to *Ewin* and *Norrington*.

MICHAELMAS TERM,

3 & 4 James 2. 1687.

The King *against* Allanson, administrator of Allanson, deceased.

A debt by simple-contract seized into the King's hands, is to be preferred to bonds not paid before seizure; but payment of bonds by an administrator, before seizure or notice of the King's debt, may be well pleaded against the King.

TH E intestate was indebted in his life-time to *Carlton* by simple-contract, and to three other persons by bond, and died. After his death, *Carlton* being indebted to the King by

by simple-contract was seized by the inquisition into the King's hands ; and upon this a *scire facias* issued against the defendant, to shew cause why the King should not have execution against him for this debt, of the goods of the intestate remaining in his hands to be administered:

The defendant pleaded in bar, the three bonds for true debts, and all in force ; and that he had fully administered ; and had nothing in his hands on the day of the inquisition, besides ten pounds, which are bound and charged in his hands with the payment of the three bonds.

The Attorney-General demurred : And the case of the *King and Knowles*, in 1683, was cited as in point for the King. And *Roll's Abr. Prerogative* 159. and *Lane* 65. were relied on by the defendant's counsel.

But the court gave judgment for the King : And held that the seizure by the inquisition of the simple-contract debt into the King's hands, preferred it to the bonds not paid before the seizure, and would be a good plea to actions on such bonds ; because it is thereby become a debt to the King upon record, and implies notice. But they also held, that if the bonds had been paid before the inquisition, or before the administrator had actual notice of the debt to the King, such payment would have been good against the King ; because there was no debt upon record, and the administrator had no means to discover whether there were any, or what debts, to the King ; and the inconvenience

nience would be infinite, if in such cases executors or administrators should, notwithstanding their utmost care, be charged with the misapplication of assets, out of their own estates. And the court held accordingly. *Hilary 6th of King George 2.* in the case of *the Attorney-General against White, Comyns's Rep. 438.*

E A S T E R T E R M,

4th of William and Mary, 1692.

The King *against* Dickenson, executor of Obedience Holcroft.

A prece-
dent judg-
ment ob-
tained by a
bond credi-
tor, shall be
preferred to
the King,
by the sta-
tute 33 H.
8. c. 39.
but a subse-
quent judg-
ment shall
not. But a
plea by an
executor of
several
judgments
is entire,
and if one
of them
fails judg-
ment shall
be against
him.

THE case was, *A.* was indebted by judgment to *B.* and by bonds to *C.* and *D.* obtained by a simple-contract to *E.* and died. *E.* being a debtor to the King, caused the debt due to him to be seized into the King's hands ; and upon this a *scire facias* issued against *Dickenson*, executor of *A.* and before the return of it *C.* and *D.* the bond-creditors, obtained judgment ; and then *Dickenson* pleaded to the *scire facias*, the judgment prior, and the subsequent judgments. The Attorney-General demurred.

The points argued in *Hilary 1691*, were, first, whether the subsequent judgments should be

be preferred to the King, for it was admitted that the precedent judgment should be preferred? Secondly, if the subsequent judgments should not be preferred, and the precedent judgment should be preferred, then if pleading them in one entire plea, judgment should be against the defendant; or if the Attorney-General ought to have replied affets beyond the first judgment?

As to the first point, *Burnet's case*, entered Hilary 31 & 32 Car. 2. Roll. 86. and *the King and Knowles*, in 1683, and *the King against Allanson*, in 1687, were cited; where it was adjudged, that a debt by simple-contract feized into the King's hands, should be preferred and paid before a debt to the subject by bond.

As to the second point, was cited the opinion of Chief Justice *Vaughan*, in *Edgecombe and Dee*, (in his reports 104.) that so long as one judgment is in force and unanswered, the plaintiff should not have judgment on such a plea. But on the contrary was cited the current opinion, and *Hancock and Proude's case*, 1 *Saund.* 337. 2 *Saunders* 50, 51. and that the plea was entire.

This case was adjourned to this term: When it was adjudged for the King; first, that his debt should be preferred before the subsequent judgments, (*viz.*) before any bond, *Hardr.* 23. but a precedent judgment should be preferred before it, upon the words of the 26th section of the statute of the 33 Hen. 8. c. 39. So always, that the King's suit be taken and commenced,

commenced, or process awarded for the debt of the King, before judgment given for the persons.

Secondly, It was adjudged, that the plea was entire ; and that it was not necessary to reply assets beyond the first judgment. See 2 *Roll.* 104. 1 *Lev.* 16. *Salk.* 298. *Carth.* 429. *Lord Raym.* 263.

H I L A R Y T E R M,

10 & 11 of William 3. 1698.

Attorney-General *against* Buckley.

Informati
on for a
penalty
abates by
the death
of the de-
fendant,
after trial
and before
judgment,
and this
may be ta-
ken advan-
tage of, by
suggestion
of the death
upon the
roll con-
fessed by
the Attor-
ney-Gene-
ral, with-
out a writ
of error.

UPON an information on the *French* act, for having in his custody *French* lace and silk, &c. whereby he forfeited such a sum, (*viz.*) so much per pound ; the defendant pleaded not guilty, and was found guilty to the value of 2000*l.* at *Nisi Prius*, after *Trinity* term last, and then died before *Michaelmas* term : And his executor moved, upon an affidavit of the death, that judgment should not be entered, because the information was abated. And upon debate, the court doubted whether this matter could appear by affidavit, without putting the party to bring a writ of error. But then it was insisted, that it was remedied by

by the act 16 & 17 Car. 2. c. 8. which helps this point in common cases ; and the doubt was, if this case of the King, for a forfeiture upon an information, was within it : The words are, " In all actions real, personal or mixt, the death of either party shall not be alledged for error." These books were cited ; 1 *Roll.* 768. *Cro. Car.* 507. 3 *Keb.* 292. *Hardr.* 161. 1 *Sid.* 131. 2 *Sid.* 34.

This motion was made in *Michaelmas* term 10 *William* 3. and adjourned to *Monday* 13th of *Feb.* 1698. When it was resolved by Lord Chief Baron *Ward*, Barons *Powis* and *Hatsell*, that judgment should be stayed : For they thought, first, that it was not an action real, personal, or mixt ; secondly, that the King was not properly said a party ; thirdly, that it was a penalty, not a duty, nor in lieu of customs or any revenue of the crown ; fourthly, that actions did not comprehend informations between party and party, nor include the King. 3 *Leon.* 215. Note, The court was in doubt, if the death might be shewn to the court by affidavit ; and, by consent, to avoid this question, it was suggested upon the roll, and confessed by the Attorney-General.

Ante. 14.
S. P.

MICHAELMAS TERM,

11th of William 3. 1699.

Sir Thomas Cooke *against* The Attorney-General and others.

No drawback is due for pepper, unless exported within the year, or prevented by accident.

If goods are imported by one, and shipped for exportation by another, who sells to a third, reserving the drawback, it is lost.

UPON an English bill, brought to have the drawback upon pepper exported, or to have new debentures, the first being cancelled by order of the commissioners of the customs; it was resolved,

First, That if goods were imported by English on the 23d of October 1697, and shipt on board for exportation on the 1st of October 1698, and then indorsed to another ship, and so did not go out of port till the 1st of November 1698, no drawback was due, for it was then out of time; and they must actually be out of port within the year, if not prevented by accident.

Secondly, That if goods were imported by one person, and shipped for exportation by another, and afterwards sent on shipboard; the second person sold to T. S. reserving for the drawback;

drawback ; in this case the drawback was lost : For the property must not be changed after the shipping or exportation. Note the second rule in the second book of rates.

Attorney-General against Weeden and Shales.

P E T E R La Store (who was a Frenchman naturalized) made his will during the war, and gave several legacies to Frenchmen living in Bourdeaux, and died. Some of the legacies were payable presently, others at age, &c. A commission issued to find this matter, and then the peace was made, and ten days after an inquisition was found and returned : And upon long debate, it was resolved,

First, That *chooses en action* which belonged to an alien enemy, were forfeitable to the crown. *Maynard's Ed. 2. inter memoranda scaccarii 41.*

Secondly, That this ought to be found by inquisition to make a title to the King ; and that this was an inquisition of intitling, and not of instruction. *Page's case, 5 Co. 52.*

Thirdly, That the peace being concluded before the inquisition was taken, discharged the cause of forfeiture.

Fourthly, That the inquisition taken afterwards, did not relate to set up this forfeiture, for the cause was but temporary ; and that cause being removed before the King's title was found, the finding after should not relate. Note, These

These cases were cited ; 19 Ed. 4. 6. 1 Saund. 361. *Toomes, administrator of Toomes, against Hetherington. Rastal's entries 605.* 2 Roll's Abr. 399. 8 Rep. 170. *Tourson's case.* 1 Inst. 118. Magn. Chart. c. 30. 2 Inst. 58. 9 Ed. 3. c. 1. 14 Ed. 3. c. 2. 2 Ric. 3. 2. 1 Rolle's Rep. 175. 3 Bulstr. 27. *The King against Williamson,* since published in Freeman's Rep. 39. Note also, great stress was laid on the articles of peace.

MICHAELMAS TERM,

12th of William 3. 1700.

Attorney General *against Basnett.*

The King under an outlawry, may redeem a mortgage, and so may the plaintiff after a lease granted by the crown and not before. IT was resolved that the King, under an outlawry in debt upon a seizure, may redeem a mortgage. A bill was brought at the relation of *A.* and not for the King; the relator had no lease, and the court would do nothing in it: But the relator alledging that he was about a ward he obtained a lease; and upon producing it in court, had a decree to redeem. See 1 Peere Williams 445. 2 Peere Williams 269.

Hilary

H I L A R Y T E R M,

13th of William 3. 1701.

The King *against* Orpheur.

IT was resolved, upon a demurrer to a plea to a writ of *scire facias*, upon a salt-bond, that *Scotland* was not in that case beyond the sea, or within the meaning of the salt-acts, to discharge a debenture or drawback of the duty, upon the salt's being shipped for and landed in *Scotland*. Scotland is not beyond sea, within the meaning of the salt-acts, to discharge a debenture or drawback.

H I L A R Y T E R M,

6th of Anne, 1707.

The Queen *against* Newel and others.

A N immediate extent issued against the defendants, directed to the sheriffs of *London*, in which there was the usual clause, empowering them to call before them, and to examine all persons proper to be examined in the premisses; and an inquisition was taken before the sheriffs, and *James Taylor* was summoned in writing. An attachment granted against a person refusing to be examined for the crown upon the execution of an extent.

writing to attend, and give evidence for the queen ; who accordingly attended, but refused to be examined as to *Newell's* books (which were in his hands, as assignee under a commission of bankruptcy,) or to any thing in the books being against himself and his own interest. The secondary certified this matter ; and it was moved for an attachment against *Taylor*, for his contempt in refusing to be examined.

Though the power given to the sheriffs by the writ, is only to propound fair and legal questions, yet the person summoned must answer all questions touching the matters to be enquired of ; which he could not demur to, if a bill in equity was filed against him, notwithstanding they may concern his own interest, provided they do not subject him to any penalty or forfeiture. And the court, thinking the questions which *Taylor* was required to answer were legal questions, granted an attachment against him.

MICHAELMAS TERM,

7th of Anne, 1708.

The Queen *and* Wood.

ON complaint that persons had not attended the execution of an extent, a new extent was ordered to be taken out, and the persons complained of were ordered to attend the execution of it; and after, the court would consider of their behaviour and costs: And they to shew cause why the prosecutor of the extent should not have costs.

Witneſſes
not attend-
ing the ex-
ecution of
an extent,
a new one
was order-
ed, and
they to
attend the
execution
of it, and
costs re-
served.

H I L A R Y T E R M,

7th of Anne, 1708.

The Queen *and* Thornton.

THORNTON was receiver of *Lancashire*, A debt due to a man
A. was indebted to him in 20*l.* and also to *jure uxoris*,
B. a single woman, by bond in 50*l.* *Thornton* is confidered as a debt
married originally
due to him, within the meaning of the statute 7 Jac. 1. c. 15.

married *B.* and afterwards took out an extent in aid against himself ; and these two debts were found, and seized into the Queen's hands : And *Thornton* made an affidavit for an extent against *A.* and set out these matters in his affidavit. But the question was, whether an extent should issue ; because the debt of 50*l.* was in right of his wife, and not originally due to him, (as the words of the act of 7 *Jac. c. 15.* and the rules were?) And upon debate, the extent did go ; for it was then the husband's, and was not a trust, as the word was originally intended to meet with : And so held in *Hob. 253. Cro. Jac. 524.*

Poole against The Attorney-General and another.

The court will decree *POOL E* devised his estate to *A.* paying 200*l.* payment of a-piece to his grandchildren, and a power legacies charged on land, to enter for non-payment, and died. *A.* sold tho' ex. tended into the Queen's hands. *B.* being indebted to the Queen, the estate was seized and extended ; and *Poole's* grandchildren brought a bill against the Attorney-General and *B.* to have the legacies, and charge the estate therewith. And decreed accordingly.

E A S T E R T E R M,

8th of Anne, 1709.

Score, who, &c. *against* the Lord Admiral.

IN a prohibition. A ship with *French* goods came into the port of *Penzance*, and was there seized by the admiral's officers, as a perquisite of the admiralty. A custom-house officer afterwards seized the ship, as forfeited on the *French* prohibition-act, and exhibited an information, and moved for a prohibition. And, upon debate it was granted; for the ship was presently forfeited by the act of parliament, upon coming into port, and the seizure afterwards of the admiralty did not prevent this forfeiture: Also, it was a seizure at land. *Note*, Lord Chief Baron *Ward* cited a case in the time of Lord *Hale*, where goods were put on board, duty not being paid, and carried to sea, and became flotsam; and a suit was commenced in the admiralty, who have jurisdiction of flotsam; and, upon an information in the exchequer for the forfeiture, in regard they were shipped before duty paid, a prohibition was granted; for the crown had a title by the forfeiture, and the goods becoming flotsam after did not purge the forfeiture.

T

Trinity

for the use of the Queen's own family ; and not by way of trade or merchandize. This is a supposed forfeiture by act of parliament to the queen ; but she could not forfeit to herself, and the moiety to the informer was only the method of distribution. He thought, that this information could not be maintained ; but that the plaintiff's remedy was by petition, if he had any right. *Stamford's Prerog.* 72, 74, 76.

Baron Bury—This act relates to trade ; and the person importing is intended a merchant for his own benefit, and not for the use of the Queen or her domestic family. All forfeitures by statute are to the queen, if not specially given. *Dr. Foster's case*, 11 Co. 60.

Lord Chief Baron Ward—A prohibition under a penalty is not an absolute prohibition, but *sub modo* ; and the prohibition in this case extends not to the Queen : The wine is found to be necessary for the use of her majesty and her family ; and if it had been imported in a *British* man of war, should the Queen forfeit the man of war to herself ?

The Barons argued more at large ; and this is only a short account of their reasons. Judgment was given for the defendant.

MICHAELMAS TERM,

8th of Anne, 1709.

Bartlett *against* The Attorney-General and others.

CLARKE, in 1691, was made collector of the customs in the port of *Boston*; *Bartlett* and others were security for him. In 1698, to W. 3. the duties were granted upon coals, &c. which by the statute, were to be under the management of the commissioners of the customs; and several clauses for that purpose in the act. The commissioners gave *Clarke* a deputation for that purpose, and took security. After wards *Clarke* died, the customs were paid; but on this new coal duty one thousand pounds remained unpaid: upon which the bond was put in suit against *Bartlett*, the widow and executrix of *Bartlett* the security, and she brought her bill: And the question was, whether the bond in which *Bartlett* became security, extended to this future duty on coals.

A bond given as security for a collector of the customs does not extend to a subsequent duty upon coals, where the collector had a new deputation, and gave security for the duty upon coals. And so it was held, where no security was given upon the second deputation.

After adjournment, the barons delivered their opinion *seriatim*, and unanimously held, that the said bond did not extend to the future duty

duty on coals, and that the plaintiff ought to be relieved ; and accordingly ordered a perpetual stay of process upon the said bond.

Bowdage *against* The Attorney-General.

THE case was the same, except that no security was given on the second deputation ; and the like decree.

MICHAELMAS TERM,

9th of Anne, 1710.

Nat, who, &c. *against* Bartlett.

Informati-
on on a de-
venerunt
for a parcel
of wine,
expressing
the value,
but not the
quantity or
kind, is
bad ;
otherwise
upon a sui-
cure, **I**N an information of *Devenerunt*, the charge was, a parcel of wine, of the value of one hundred pounds. And after a verdict for the Queen, the defendant moved in arrest of judgment for the uncertainty ; because neither the quantity nor the kinds, as hogsheads, &c. nor the kinds, as French, Spanish, &c. were mentioned. And upon debate and consideration, judgment was for this omission arrested, notwithstanding many precedents produced within twelve or fourteen years last, (but no ancient ones appeared;) and a difference was relied on in this information, which is in nature of a trover or trespass ; and informations of seizure, which are made certain

certain by the writ of appraisement ; and as to the objection of a general *indebitatus assumpsit*, it was said, that that is upon a contract, and so it may be known what the matter is, or what is contracted for ; but this is a tort. 2 *Lev.* 195. 1 *Ventr.* 272. *Styles* 360. 2 *Ventr.* 262. 2 *Jones* 109. *Cro. Eliz.* 865. Note, Baron *Price* was of the contrary opinion, and thought the information good ; but judgment was arrested by the other barons, on the 28th of November, in this term.

Attorney-General against Crefner.

AN *English* information was brought, to discover what stock in hand of pepper, the defendant had on the 8th of February last, and to recover the duty of one shilling and six-pence in the pound, laid upon it by act of the last session ; which enacts, that the person shall enter the same at the custom-house, before the 15th of May, or in case of neglect, he forfeits the pepper, or the value thereof. To this bill the defendant demurred, because it subjects him to a penalty ; and the year not being past, he is liable to the common informer : And Mr. Attorney's waiver will not prevent the common informer ; nor is this bill pleadable to a *qui tam* information ; nor can an injunction be granted, to stay the common informer's suit. And the demurrer was allowed by the whole court, 8th of December 1710, at *Serjeants-Inn*. See the precedents, *Mich.* 1705, *Attorney-General and Smyth*, for the duties on wines ; *Mich.* 6 Ann. *Attorney-General against Pocock and other Mafsters* ; *Mich.* 1707, *Attorney-General against Bervis*

An information to discover the defendant's stock of pepper ; the defendant demurred, because it would subject him to a penalty, the year not being past ; and demurrer allowed.

Bewis and others, for the duty on coals. *Note*, If the year be past, so that the common informer cannot sue, then an *English* information lies for the Attorney-General to discover, he waiving penalties and forfeitures; otherwise not. *Note*, The Lord Chief Baron said, If Mr. Attorney-General, within the year, prefers an information, whereby the common informer is barred, and then brings a bill to discover, it will be good. *Quere*.

TRINITY TERM,

10th of Anne, 1711,

Weddel, who, &c. against Thurlow and Harris. Entered Mich. 7th of Queen Anne, 1708. Roll. 63,

The Queen's share was pardoned by the act of general pardon, 7 Ann. c. 22. but not the informer's.

UPON a motion in arrest of judgment, it was resolved by the court (upon consultation with all the justices) that the Queen's part was pardoned, but the informer's was not; because the words of the act of general pardon, 7 Ann. c. 22. are, "all that the crown could pardon." But by the information filed, (which was before the pardon,) the informer's part was fixed and vested. This matter was depending several terms; and on Tuesday, 19th of June,

June, in this term, the court was of opinion, that the informer's moiety was not pardoned, but gave judgment for the defendant as to the Queen's moiety. 1 Hen. 7. pl. 2. Cro. Eliz. 138, Jenk. Cent. 164, 2 Strange 1272.

TRINITY TERM,

12th of Anne, 1713.

The Queen *against* Joseph Quash.

IT was adjudged, that immediate extents for Immediate
extents
shall be
preferred
according
to the teste,
and before
extents in
aid. the crown, finding the same goods found upon a former extent in aid, shall be preferred and paid before it; and among immediate extents, they shall take place according to the teste.

The court gave their opinion, that the extents for debts immediately due to the crown shall be first satisfied and paid, and that the extents in aid shall be postponed till such debts be paid and satisfied; and ordered that all further proceedings upon the several extents against the defendant for the several debts seized in aid of A. B. and C. shall be and are hereby stayed,

stayed, until her majesty's debts, due from the said defendant upon the post-office account, the old duty on houses, the land-tax, and new duty on houses, shall be satisfied and paid, with costs and charges ; and the debt due upon the post-office account, together with costs and charges, to be first paid.

MICHAELMAS TERM,

4th of George I. 1717.

The King and Bowdage.

An immediate extent shall be preferred to an extent in aid; and a second immediate extent, upon which evidence

AN extent issued in aid, and goods found and seized ; and upon a *venditioni expoenas*, the sheriff returned, that he had the money : then came an immediate extent for the crown, which also found the goods first extended. The King shall have them : But not if they had been delivered.

evidence was offered to find the goods seized in aid, shall be preferred to a prior immediate extent, not offering such evidence.

In this case, there were two immediate extents for the crown ; the first found goods, but not what were found on the extent in aid, nor was any

any evidence offered as to those goods, nor was it insisted that they should be found; then came another immediate extent, and the person prosecuting it offered to find what was seized in aid, and was refused: The court ordered a new extent, of the like teste as the second immediate extent was, and refused it to the first immediate extent. And this was held to be the law and course of the exchequer.

F I N I S.

1

A

T A B L E

OF THE

PRINCIPAL MATTERS.

A.

ABATEMENT.

INFORMATION for a penalty abates by the death of the defendant after trial and before judgment; and this may be taken advantage of by suggestion of the death upon the roll, confessed by the Attorney-General, without a writ of error

Page 264

ACTION.

An action does not include an information for the King and party.

92, 265

The court removed an action into the office of pleas, where it appeared the crown was concerned in the event of it *Page*

143

ADMIRALTY. *See* prohibition, recognizance.

ALIEN.

A person suggested to be an alien in an information exhibited for the King, must answer whether he be an alien or not, and cannot demur to the discovery *144* Choses in action belonging to an alien enemy are forfeited to the crown,

A T A B L E O F T H E

crown, but there must be a commission and inquisition to intitle the King; and a peace before inquisition discharges the cause of forfeiture *Page 267*

APPRAISEMENT, writ of

Upon an information of seizure of British and foreign coins there is no occasion for this writ *57*

ATTACHMENT. *See* contempt.

C.

COINS.

Upon an information of seizure of British and foreign coins, there is no occasion for a writ of appraisement, or a second proclamation; and judgment may be for the coins themselves *57*

COMMISSION.

There must be a commission and inquisition to intitle the King to choses in action belonging to an alien enemy, and a peace before inquisition discharges the cause of forfeiture *267*

COMPOSITION OF FINES.
See Court.

CONTEMPT.

An attachment granted against a person refusing to be examined for the crown upon the execution of an extent *Page 269*

COPYHOLD.

Copyhold lands are not liable to be seized upon an outlawry, because it would be prejudicial to the lord of the manor. *190*
Nor upon an extent *195*

COSTS.

Attorney-General, as well as the officer, is intitled to costs by the act 8 Anne, c. 7. where there is judgment for the King *91*

COURT. *See* removal of actions.

Where the court will order judgment for the defendant in a crown-cause, unless Mr. Attorney-General will proceed *56*

Upon a seizure of perishable goods, the court has a discretionary power to order a sale without the consent of the claimer, but cannot order the goods to be sold after judgment pending a writ of error *70*

The power of the court to enforce a due execution of the revenue laws *82, 83*
The

P R I N C I P A L M A T T E R S.

The court by privy seal, may discharge a penalty fixed by statute, as well as a fine set by judgment of a court *Page 165*

The court will decree payment of legacies charged on land, though extended into the Queen's hands *272*

CUSTOMS. *See Forfeiture.*

Raisins imported from *Marabella* or *Estatona*, being within the jurisdiction of *Malaga* in *Spain*, are to pay duty as great raisins *37*

Ships taken as prize by a *British* man of war are liable to the duty of *5l. per cent. ad valorem*, charged upon goods and merchandizes by *12 Car. 2. c. 4.* *198*

But *French*-made sails belonging to a *French* ship taken as aforesaid, are not chargeable with the additional duty of *1d. per ell*, by *12 Ann. c. 16.* and *19 Geo. 2. c. 27.* *224, 225*

Where a ship is forfeited, and afterwards seized by the admiralty, the court will grant a prohibition *273*

A bond given as security for a collector of the customs does not extend to a subsequent duty upon coals; where the collector had a new deputation, and gave security for the duty upon coals; and so it was held where no security was given upon the second deputation *277*

D.

DEATH. *See Abatement.*

DEBENTURE. *See Drawback.*

DEBT TO THE KING AND IN AID. *See extent.*

Where it shall be preferred to that of the subject, and where not

101
A debt by simple-contract seized into the King's hands, is to be preferred to bonds not paid before seizure, but payment of bonds by an administrator before seizure or notice of the King's debt, may be well pleaded against the King *260*

A precedent judgment obtained by a bond-creditor shall be preferred to the King by the statute *33 Hen. 8. c. 39.* but a subsequent judgment shall not *262*

A debt due to a man *jure uxoris* is considered as a debt originally due to him, within the meaning of the statute *7 Jac. 1. c. 15.* *271*

DELIVERY, writ of.

It is discretionary in the court, according to the circumstances of each case, to grant a writ of delivery or not. Denied for tobacco-stalks, and why *196*

DEMURRER.

A T A B L E O F T H E

DEMURRER.

A person suggested to be an alien in an information exhibited for the King, cannot demur to the discovery, but must answer whether he is an alien or not

Page 144

A person no way concerned in interest may demur to the discovery required by a bill, because he may be examined as a witness. *Alior* where he is interested in the event of the cause

162, 164

Information to discover the defendant's stock of pepper; defendant demurred, because it would subject him to a penalty the year not being past; and demurrer allowed

279

DIEM CLAUSIT EXTREMUM.

No *diem clausit extremum* can issue regularly against the estate of a person who was not debtor to the King, or found in his lifetime to be debtor to the King's debtor

16

Where a person is indebted by simple contract to the King at his death, and that debt is found upon a commission, a *diem clausit extremum* may issue against his estate, though he was not debtor to the King by record at his death

95

DISTRESS.

An immediate extent against the King's debtor, tested after a distress for rent justly due to the landlord, with notice to the tenant being the King's debtor, and appraisement of the goods and chattels, but before sale, shall prevail against the distress

Page 112

DRAWBACK.

No drawback is due for pepper, unless exported within the year, or prevented by accident

266

If goods are imported by one, and shipped for exportation by another, who sells to a third, reserving the drawback, it is lost

266

Scotland is not beyond sea within the meaning of the salt acts to discharge a debenture or drawback

269

E.

ERROR.

The court cannot order perishable goods to be sold after judgment pending a writ of error

70

Where

P R I N C I P A L M A T T E R S.

Where a writ of error is brought upon a judgment in this court, and abates by the death of the plaintiff in error, the new writ of error must be directed to the treasurer and barons, and not to the lord chancellor, the office of lord treasurer being vacant	<i>Page 142, 143</i>	of the same teste as the first <i>Page 35</i>
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EXECUTORS.		Copyhold lands are not liable to be seized upon an extent, because it would be prejudicial to the lord of the manor <i>195</i>
Where they are answerable for each other's deficiency, and where not	172	Debts, either by specialty or simple-contract, may be found and seized into the King's hands to the third degree, but not beyond <i>259, 260</i>
EXTENT. Immediate and in aid.		An attachment granted against a person refusing to be examined for the crown upon the execution of an extent <i>269</i>
A second extent tested after an assignment under a commission of bankruptcy, and all proceedings were quashed: but liberty given to move for a new extent	U	Witnesses not attending the execution of an extent, a new one ordered,

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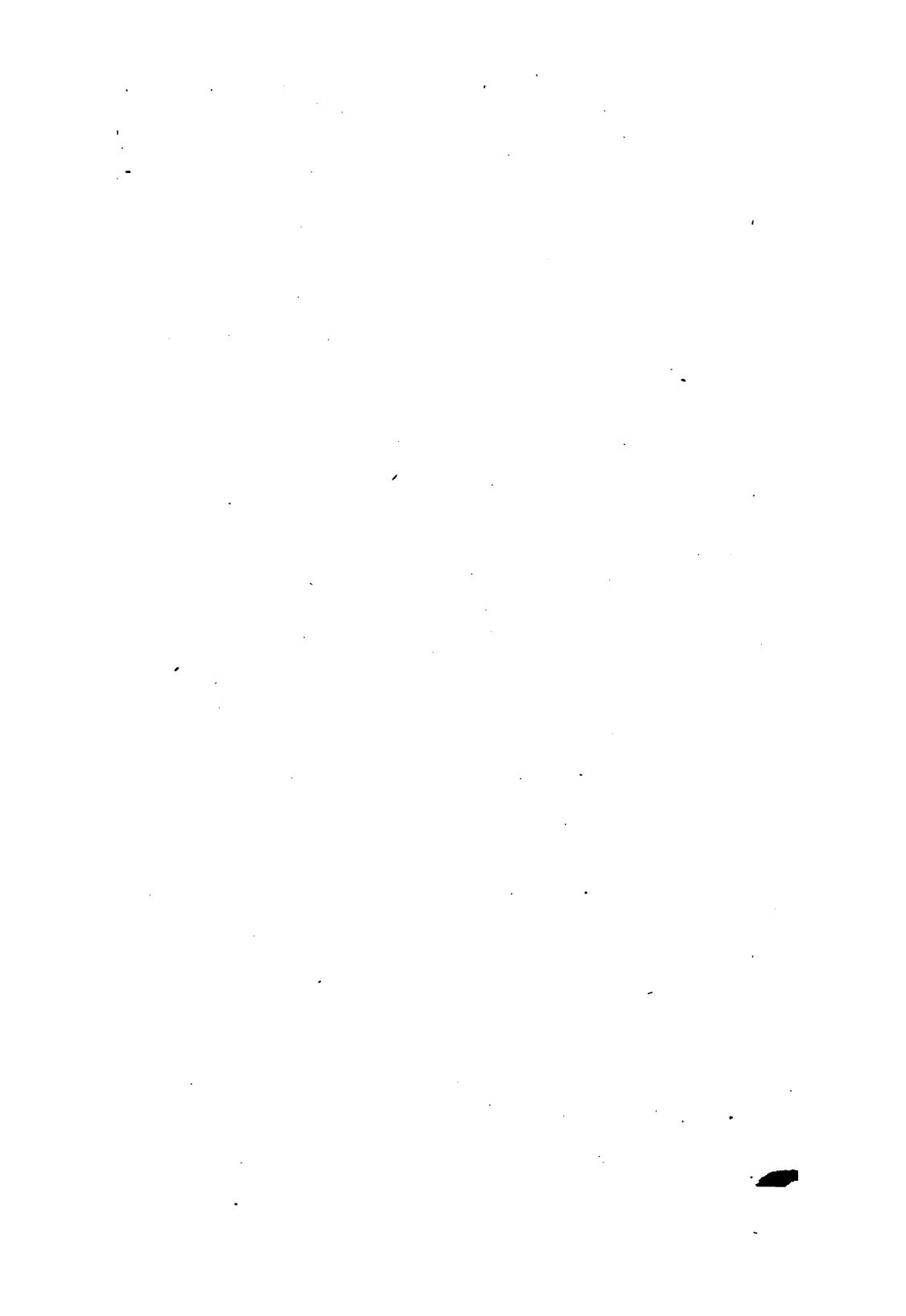
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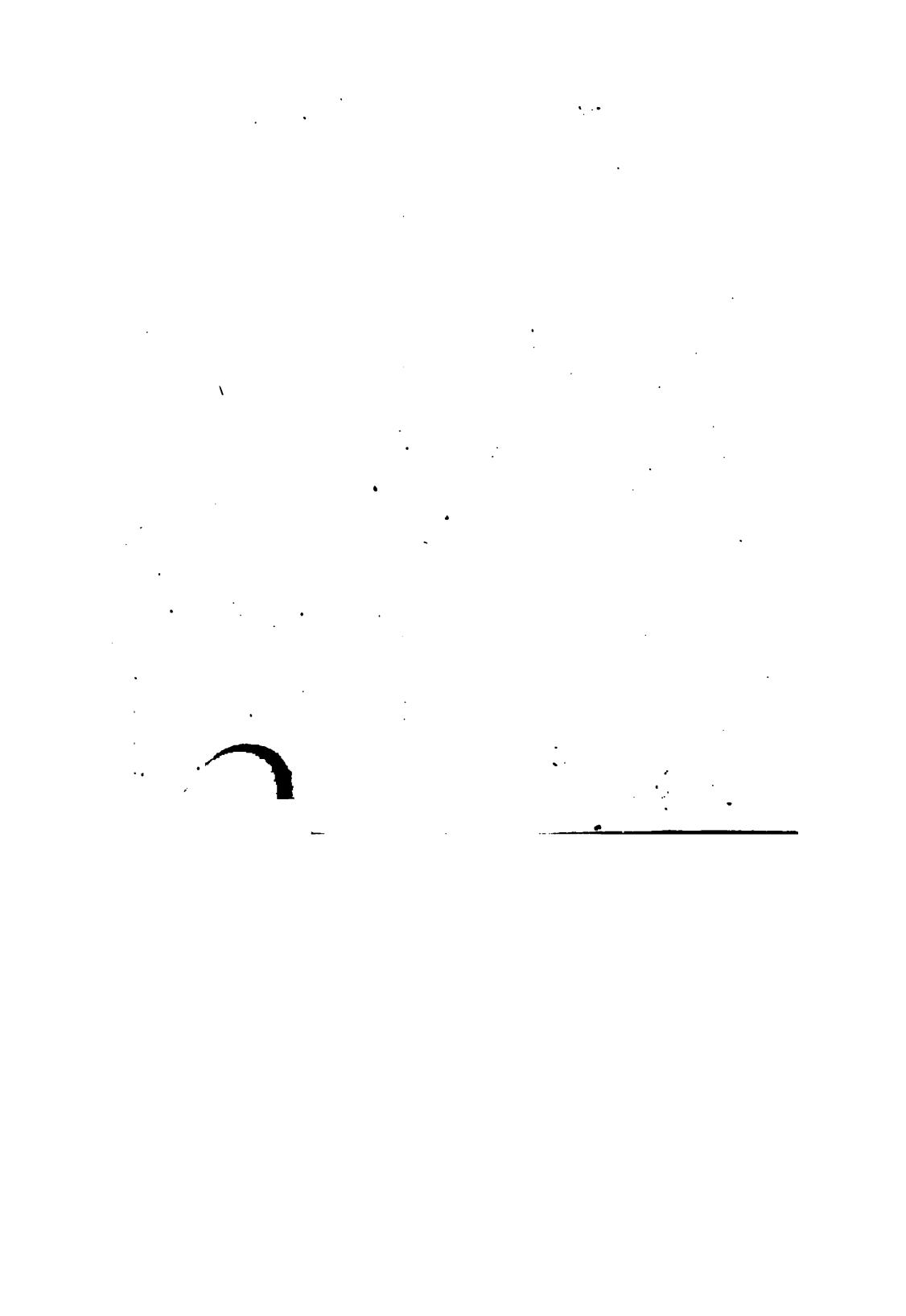
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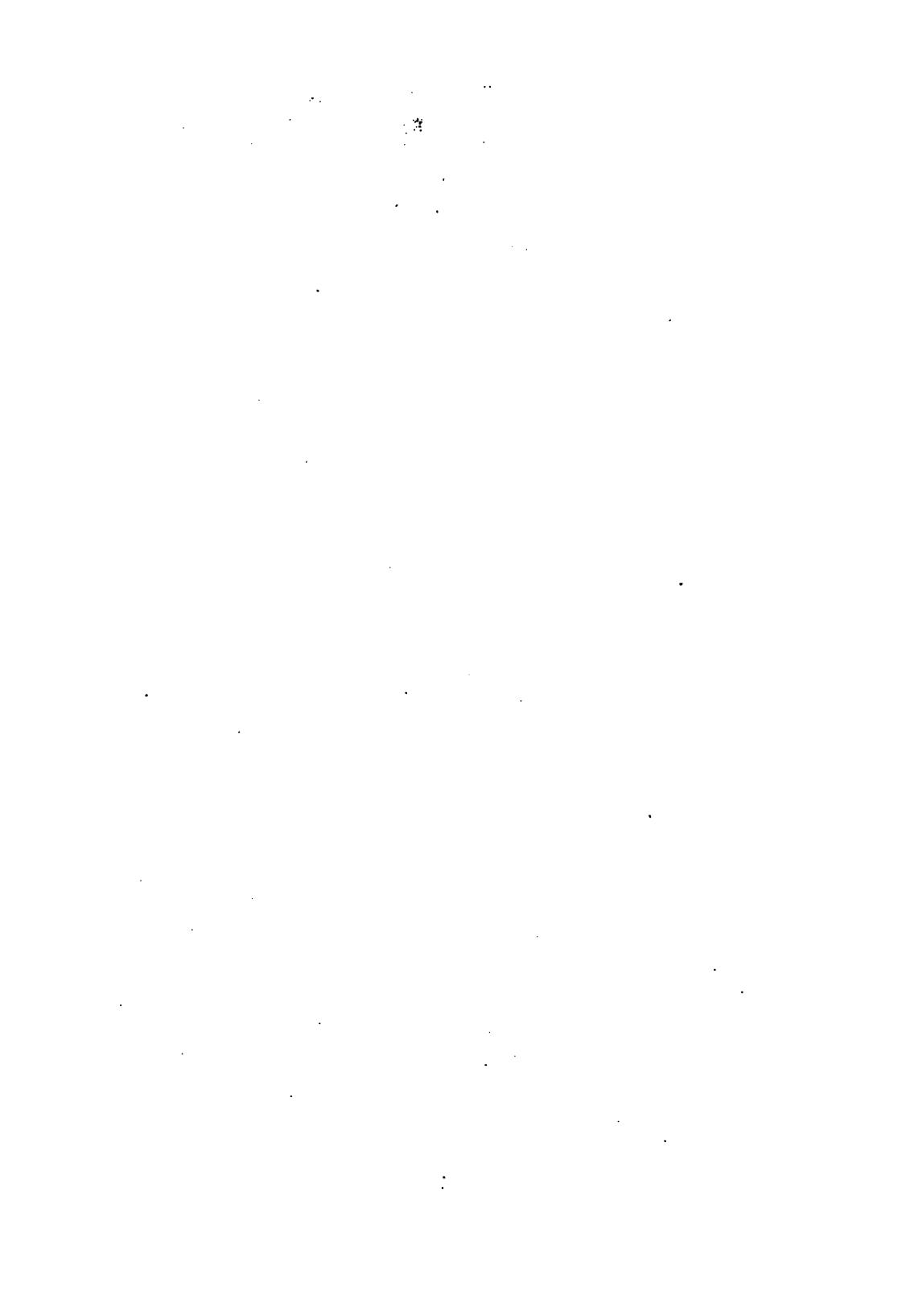
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